Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

MICHAEL-F. CRAIG, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a harmless beyond a reasonable doubt analysis applies to a violation of an appellant's right to a speedy post-trial appeal, which is recognized as a constitutional due process right and is tested under an analysis that already includes the element of prejudice derived from *Barker v. Wingo*, 407 U.S. 514 (1972).

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Staff Sergeant Michael F. Craig, United States Marine Corps (USMC), Lance Corporal Cameron D. Boles, USMC, Aviation Machinist's Mate First Class Charles M. Bricker, United States Navy (USN), Chief Fire Controlman Salvador Diaz, USN, Hull Maintenance Technician Leonard Y. Duran, USN, Builder Second Class Christopher B. Durfee, USN, Machinist's Mate Second Class Tyrone J. Forney, USN, Ship's Serviceman Third Class Vincent Francois, USN, Fireman Controlman Second Class David A. Gaines, USN, Lance Corporal Timothy G. Gilmore, USMC, Sergeant Christopher L. Harris, USMC, Corporal William R. Humphrey, USMC, Quartermaster Third Class Troy B. Jenkins, USN, Corporal Damon G. Johnson II, USMC, Fireman Joseph R. Kamely, USN, Lance Corporal John W. Leger II, USMC, Staff Sergeant Christopher M. Lucas, USMC, Captain Scott R. McClelland, Medical Corps, USN, Aviation Boatswain's Mate Franklin Owens, Jr., USN, Lance Corporal Jason A. Phillips, USMC, Quartermaster First Class Trent T. Pritchett, USN, Staff Storekeeper Third Class Aaron T. Ruggs, USN, Gunner's Mate (Missiles) Seaman Apprentice Lori L. Spencer, USN, Dental Technician First Class Columbia R. Shiloh, USN, Major Wayne D. Szymczyk, USMC, Lance Corporal Jeremy D. Thompson, USMC, Aviation Structural Mechanic Airman Apprentice Michael G. Tilman, USN, Fire Control Technician Third Class Michael A. White, USN, and Lance Corporal Kykaiya A. Williams, USMC

LIST OF PARTIES - Continued

were individual appellants in the Navy-Marine Corps Court of Criminal Appeals and the Court of Appeals for the Armed Forces. The Respondent is the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS AND ORDERS BELOW

The orders of the Court of Appeals for the Armed Forces are reproduced in the appendix (App. 1*a*-453*a*) and have not yet been reported. With the exception of two cases, the opinions of the Navy-Marine Corps Court of Criminal Appeals (App. 3*a*-455*a*) are unreported and are reproduced in the appendix. The two reported opinions are *United States v. Gaines*, 61 M.J. 689 (N-M. Ct. Crim. App. 2005) and *United States v. Jenkins*, 62 M.J. 582 (N-M. Ct. Crim. App. 2005), which appear respectively at App. 134*a* and App. 184*a*.

JURISDICTION

The lower court granted review of Petitioners' cases and affirmed their convictions on various dates from September 11, 2006 to October 20, 2006. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1259(3). Petitioners invoked the jurisdiction of the Court of Appeals for the Armed Forces under Article 67(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(3). The Navy-Marine Corps Court of Criminal Appeals had jurisdiction over their cases pursuant to automatic appeals under Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution reads, in part:

> No person ... shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law ....

Article 66 (c), UCMJ, is set forth at App. 476*a*.

PRELIMINARY STATEMENT

The Court of Appeals for the Armed Forces (CAAF) assumed a statutory and constitutional due process violation in each Petitioner's right to a speedy post-trial appeal, but declined to grant a remedy because the violations were harmless beyond a reasonable doubt. This Court has never addressed whether a constitutional violation of an appellant's right to a speedy appeal can be rendered harmless beyond a reasonable doubt. In *Chapman v. California*, 386 U.S. 18 (1967), this Court applied the harmless-error doctrine to a constitutional violation by testing whether the error was harmless beyond a reasonable doubt. *Id.* at 24. But no district or Circuit Court of Appeals has ever applied that doctrine to constitutional violations of a right to a speedy post-trial appeal. The CAAF is the only federal court to use the harmless beyond a reasonable doubt standard in evaluating a speedy post-trial due process violation. The application of the doctrine by the CAAF

presents a departure from the jurisprudence of appellate courts and creates an unsettled issue in law that Petitioners respectfully ask this Court to resolve.

STATEMENT

The twenty-nine named Petitioners suffered excessive post-trial delays on their automatic appeals to the Navy-Marine Corps Court of Criminal Appeals (NMCCA) ranging from two years, two months to seven years, two months. Seventeen of the twenty-nine Petitioners experienced post-trial delay in excess of four years. Petitioners represent a small fraction of the appellants who experienced post-trial appellate delays during the years 2001 to 2004. The nature of Petitioners' delays range from the post-trial processing that occurred before a case was docketed with the NMMCA to delays that occurred after a case was docketed.

1. Post-Trial Delay In The Naval Service.

The CAAF identified understaffing of appellate defense attorneys as the root cause of post-trial delay at the NMCCA post-docketing level. As early as 2000, it noted the chronic understaffing of the Navy-Marine Corps Appellate Defense Division. *United States v. Lynn*, 54 M.J. 202 n.11 (C.A.A.F. 2000).

In 2003, the CAAF granted review of a *pro se* extraordinary writ filed by an appellant desperate to have his case briefed. *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34 (C.A.A.F. 2003) (one of the named

Petitioners). The CAAF explicitly recognized the understaffing of appellate defense attorneys and placed the responsibility to ensure timely appeals on both the Government and the NMCCA. *Id.* at 38.

The reasons for the occurrence of post-trial delay before a case was docketed with the NMCCA were harder to identify because delay could not be attributed to a single root cause. Nevertheless, the CAAF was aware that this form of post-trial delay was systemic, and in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) the CAAF, expressing its exhaustion with the issue, outlined rigid time standards for processing an appellant's appeal both before and after it arrived at the appellate service courts. *Id.* at 142.

Unfortunately for Petitioners, *Moreno* came too late to affect their cases. After suffering extreme delays, their only recourse was to show that delay in their cases amounted to a constitutional and statutory due process violation necessitating a remedy.

2. The Analysis of Post-Trial Delay Under The Constitution.

While this Court has not yet addressed the issue of whether an appellant has a constitutional due process right to a speedy appeal, most federal courts have found that such a right does exist within the Constitution's Due Process Clause. *See e.g., United States v. Smith*, 94 F.3d 204, 206 (6th Cir. 1996). The language most frequently relied upon has been this Court's decision in

Evitts v. Lucey, 469 U.S. 387, 393 (1985) finding that where an appeal is an integral part of final adjudication, appellate procedures must comport with the demands of due process.

Consistent with the federal appellate courts, the CAAF recognizes that an appellant is entitled to timely appellate review, and identifies both "statutory and constitutional roots" to this right under Article 66, UCMJ and the Due Process Clause. *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004) (*Toohey I)* (citing *Diaz*, 59 M.J. at 37-38). The constitutional post-trial speedy appeal test adopted by the CAAF, and used in Petitioners' cases, is a four-factor test determining: 1) the length of delay, 2) reasons for the delay, 3) the assertion of right to a timely appeal, and 4) prejudice. *Toohey I*, 60 M.J. at 102. The four-factors are derived from this Court's test for violation of speedy trial rights in *Barker v. Wingo*, 407 U.S. 514 (1972). The CAAF adopted the four factors in explicit conformance with tests applied by a majority of Circuit Courts of Appeals. *Toohey I*, 60 M.J. at 102. Also, consistent with other federal appellate courts, the CAAF adopted modifications to the *Barker* factor used for establishing prejudice. An appellant could prove prejudice by showing that his incarceration was oppressive, that the delay caused anxiety or concern, or that his case was impaired due to a lengthy appeal. *Moreno*, 63 M.J. at 138-39.

3. The Orders Of The Court Of Appeals For The Armed Forces.

From September 11, 2006 to October 20, 2006, the CAAF issued orders in Petitioners' cases, resolving the issue of post-trial appellate delay against them. The CAAF's orders were not based on Petitioners' failure under the *Barker* derived analysis. Instead, it was based on its decision in *United States v. Allison*, 65 M.J. 365 (C.A.A.F. 2006) which had added a novel analysis to post-trial delay cases. In *Allison*, the CAAF held that "in cases involving claims that an appellant has been denied his due process right to speedy post-trial review and appeal, we may look initially to whether the denial of due process, if any, is harmless beyond a reasonable doubt." *Id.* at 370-71.

In all of the Petitioners' orders, the CAAF assumed that a post-trial delay constitutional due process violation had occurred, but found every violation harmless beyond a reasonable doubt. These orders therefore grant Petitioners a hollow victory for a due process violation per the accepted test adopted by the majority of Courts of Appeals. It denies any remedy by adhering to a second layer of analysis that has not been applied by any other court.

REASONS FOR GRANTING THE PETITION

I. THE APPLICATION OF THE HARMLESS ERROR DOCTRINE TO A POST-TRIAL DELAY CONSTITUTIONAL DUE PROCESS VIOLATION IS INCONSISTENT WITH THE PRIOR APPLICATION OF THE HARMLESS ERROR DOCTRINE BY THIS COURT AND INCONSISTENT WITH THE ACCEPTED TEST DEVELOPED TO COMBAT POST-TRIAL DELAY.

The practical effect of implementing a "re-test" for harm is that an appellant's right to a speedy appeal is withered into something less than an enforceable right that must comport with due process concerns. The CAAF has applied the harmless error doctrine inconsistently into an analysis that already considers harm. The CAAF's application of the harmless error doctrine is inconsistent in three ways: 1) it is contrary to how federal courts approach a post-trial delay analysis, 2) it is contrary to how this Court has applied the harmless error doctrine, and 3) it fails to alleviate the appearance of injustice where inordinate delay has occurred.

A. The Adoption Of A Test By Federal Courts To Determine Whether A Due Process Violation Has Occurred Based Upon Post-Trial Delay.

An appeal is a critical component of a criminal justice system because it ensures both the accuracy and the

legitimacy of the trial court judgment. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); Marc Arkin, *Speedy Criminal Appeal: A Right Without a Remedy*, 74 MINN. L. REV. 437, 496 (1990). Speedy appeals either validate a trial court's findings and provide society with a finality of judgment and deterrence for future offenders, or correct trial level errors and prevent improper convictions or unjust incarceration. *See Peyton v. Rowe*, 391 U.S. 54, 63 (1968); *Arkin*, *supra* at 496.

The United States Constitution does not require that an accused be afforded the right to appeal a criminal conviction. *Ross v. Moffitt*, 417 U.S. 600, 611 (1974) (citing *McKane v. Durston*, 153 U.S. 684, 687-88 (1894)). But despite the absence of a constitutional prescription for an appellate process, this Court has held that when an accused is afforded appellate review of his conviction, that appeal must satisfy federal constitutional due process requirements. *Evitts*, 469 U.S. at 400-01 (citing *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970)); *Griffin*, 351 U.S. at 20; *See also Harris v. Champion*, 15 F.3d 1538, 1558 (10th Cir. 1994).

More specifically, an accused appealing a conviction has a due process right to an "adequate and effective" appellate hearing. *Griffin*, 351 U.S. at 20. Components of an adequate and effective appellate hearing include the right to effective appellate counsel and the right to a timely review of the appeal. *Douglas v. California*, 372 U.S. 353, 358 (1963); *Arkin*, *supra* at 447.

Article 66(b) of the Uniform Code of Military Justice

(UCMJ) gives a service member convicted at a special or general court-martial an appeal-as-of-right to a service Court of Criminal Appeals in cases where the approved sentence extends to either a punitive discharge or confinement for one year or more. 10 U.S.C. § 66(b). Article 67(a), UCMJ requires the Court of Appeals for the Armed Forces to review those appeals: (1) in which the sentence affirmed by the Court of Criminal Appeals extends to death, (2) that the cognizant Judge Advocate General certifies for review, or (3) in which the accused demonstrates "good cause shown." 10 U.S.C. § 67(a).

This Court has never ruled on whether a convicted defendant has a constitutional right to a speedy appeal; however, the Second, Third, Fourth, Fifth and Tenth Circuits, as well as the Court of Appeals for the Armed Forces, have ruled that excessive delays in both state and court-martial post-conviction proceedings violate an accused's right to constitutional due process under the Fifth Amendment. *See Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981); *Smith v. Kansas*, 356 F.2d 654, 656-57 (10th Cir. 1966), *cert. denied*, 389 U.S. 871 (1967); *Simmons v. Beyer*, 44 F.3d 1160, 1170-71 (3d Cir. 1995), *cert. denied*, 516 U.S. 905 (1995); *Ward v. Freeman*, 1995 U.S. App. LEXIS 2304, 5 (4th Cir. 1995)(per curiam); *Cody v. Henderson*, 936 F.2d 715, 719 (2d Cir. 1991); *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006) (*Toohey II*); *Diaz*, 59 M.J. at 38.

The First, Sixth, Seventh, Eighth and Ninth Circuits have also held that an accused has a constitutional due

process right to a speedy appeal, but they have not found a due process violation in cases they have considered. *See United States v. Smith*, 94 F.3d 204, 206 (6th Cir. 1996), *cert. denied*, 519 U.S. 1133 (1997); *United States v. Hawkins*, 78 F.3d 348, 350 (8th Cir. 1996), *cert. denied*, 519 U.S. 844 (1996); *Allen v. Duckworth*, 6 F.3d 458, 459 (7th Cir. 1993), *cert. denied*, 510 U.S. 1132 (1994); *United States v. DeLeon*, 444 F.3d 41, 43-44 (1st Cir. 2006); *United States v. Mohawk*, 20 F.3d 1480, 1485 (9th Cir. 1994).

The Fifth Circuit's decision in *Rheuark v. Shaw* is particularly significant because it is the first holding to define the right to a speedy appeal by adopting the four *Barker v. Wingo* factors used to measure whether an accused has been given a speedy trial under the Sixth Amendment. *Rheuark*, 628 F.2d at 303 (citing *Barker v. Wingo*, 407 U.S. 514 (1972)); *Arkin*, *supra* at 471-72, 481. Under the *Barker* test, four factors are weighed on an ad hoc basis: the amount of delay, the reason(s) for the delay, the accused's assertion of the right, and the existence of prejudice to the accused. *Rheuark*, 628 F.2d at 303 (citing *Barker*, 407 U.S. at 530).

The *Rheuark* Court modified the prejudice prong and held that prejudice in the appellate context should be measured by preventing oppressive incarceration pending appeal, minimizing anxiety and concern pending the outcome of the appeal, limiting the possible impairment of a convicted accused's grounds for appeal, and preventing impairment of the accused's ability to mount a defense in the event of a rehearing or retrial. *Id.*

Once all four *Barker* factors are individually analyzed, the factors are then balanced collectively in determining if a due process violation exists. *Id.; Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990); *Toohey II*, 63 M.J. at 361-62; *Arkin, supra* at 474.

While the existence of prejudice may affect the severity of the violation or selection of the remedy, a finding of prejudice is not necessary to establish a speedy appeal due process violation under the *Barker* derived standard. *Simmons*, 898 F.2d at 868; *Toohey II*, 63 M.J. at 361-62; *Arkin, supra* at 474.

B. The Application Of The Harmless Error Doctrine To Post-Trial Delay Cases.

The CAAF is the only federal appellate court to apply the harmless error doctrine to post-trial delay cases, even after finding that a due process violation can exist without a finding of prejudice under the fourth *Barker* prong. *Toohey II*, 63 M.J. at 363.

In its adjudication of the twenty-nine consolidated appeals before this Court, the CAAF repeatedly found unjustified appellate delay amounting to constitutional due process violations. Even with its findings of repeated due process violations, the CAAF never fashioned a single remedy because it found the constitutional violation in each case harmless beyond a reasonable doubt. *See Chapman*, 386 U.S. at 24.

The CAAF's first use of the harmless error doctrine in a post-trial delay case occurred in *Toohey II*, which was the direct appeal of *Toohey I*, an extraordinary writ appeal that had established the *Barker* derived test for post-trial delay cases in the military. In *Toohey II*, the appellant suffered over six years of post-trial delay and was found by the CAAF to have suffered a constitutional due process violation under the *Barker* derived analysis. *Toohey II*, 63 M.J. at 362. The key aspect of *Toohey II* was that the appellant failed to show prejudice and, therefore, only met three of the *Barker* factors. The CAAF reasoned that because the other three *Barker* factors weighed heavily in favor of the appellant, a conclusion could be reached that the post-trial delay was "egregious." *Id.*

The CAAF's finding of a constitutional due process violation, in the absence of prejudice, resolved the question of whether prejudice should control the post-trial delay analysis – a question prevalent since the courts first adopted the *Barker* derived test. One commentator has stated that although the prejudice factor is useful in a speedy trial analysis to determine whether a defendant is gaming the system for more time, in the appellate delay context there is no such incentive. *Arkin, supra* at 477-79. The prejudice factor in appellate delay analysis invariably prohibits any remedy to violations of an appellant's right to a timely appeal because it is too hard to establish prejudice on appeal. *Id.*

The CAAF's analysis in *Toohey II* allowed for instances where prejudice could not be articulated, but

where inordinate post-trial delay was nevertheless recognized. But the CAAF's excellent analysis then turned sour with its adoption of the harmless error doctrine. *Toohey II*, 63 M.J. at 363. And, although the appellant in *Toohey II* prevailed under the analysis, the damage to how military courts approach post-trial appeal cases was done. Service members, who have suffered post-trial delay, must now undergo two gauntlets of harm analysis before they may be granted a remedy – the *Barker* derived analysis, and the harmless beyond a reasonable doubt analysis.

C. The Inconsistency Of The CAAF's Approach With This Court's Application Of The Harmless Error Doctrine.

The most confounding aspect of the CAAF's use of the harmless error doctrine is that it is applied after a prejudice analysis has already been conducted. Not only does such an application expose an appellant to a more stringent test, it also misapplies the harmless error doctrine. In *Chapman v. California*, this Court recognized that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may ... be deemed harmless." *Chapman*, 386 U.S. at 22. At the same time, the Court stated that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* at 23. The latter cases tend to focus on constitutional violations that reveal a lack of fundamental fairness in the justice system. *See e.g., Arizona v. Fulminante*, 499

U.S. 279 (1991). In *Fulminante*, this Court identified these violations as "structural."

While Petitioners' cases have never been identified as "structural" violations, they have been analogized, conceptually, with cases which are not subject to a harmless error analysis – speedy trial cases. In *Fulminante*, this Court did not mention speedy trial violations within the class of cases that defy harmless error analysis. Yet, it is axiomatic that once a speedy trial violation is found, that violation is not subject to a harmless error analysis. *United States v. Strunk*, 412 U.S. 434 (1973). *Strunk* was decided a year after this Court formulated the *Barker* analysis and, consistent with that analysis, did not bar relief based on the absence of prejudice. *Id.* at 438-39.

In *Strunk*, this Court emphasized the difficulty in curing a speedy trial violation, and that such a violation could not co-exist with a plenary requirement that harm, or harmlessness, be shown. *Id.* at 439. Such concerns also exist in post-trial delay cases, where an appellant's harm is usually tied to whether he can prevail on the substantive issues of his appeal. The lack of a meritorious appeal then becomes a barrier to relief for inordinate post-trial delay. This Court has disallowed such prerequisites to the exercise of a due process right. *See e.g., Draper v. Washington*, 372 U.S. 487, 497-99 (1963) (due process violation where an indigent was required to convince a judge that his appeal was not frivolous in order to receive transcript); *Eskridge v. Washington State Bd. of Prison Terms and Paroles*, 357

U.S. 214, 216 (1958) (per curiam) (due process violation where an indigent was required to convince a judge that justice would be served by his appeal). It follows then that the CAAF's initial decision in *Toohey II* - finding a due process violation because the first three *Barker* derived factors significantly outweighed the lack of prejudice - is consistent with the fair application of a test meant to protect all appellants who have suffered a due process violation. But the CAAF's inexplicable application of the harmless beyond a reasonable doubt analysis to re-test for harm completely undermines the otherwise fair analysis.

Another significant aspect of *Strunk* is that this Court disallowed the application of an element that was already included in the *Barker* analysis. The adoption of the harmless doctrine as second tier to the already established post-trial delay test creates a redundancy and inefficiency in the analysis for prejudice. In the Petitioners' consolidated twenty-nine cases it is unclear how the government showed harmlessness beyond a reasonable doubt. The adoption of the harmless error doctrine to Petitioners' cases only serves to revisit the issue of prejudice, or the lack of it, and isolates that factor alone so that the counterbalancing factors that gave rise to the due process violation become insignificant.

D. Subjecting Petitioners' Cases To A Harmless Error Analysis Does Not Comport With The Judicial Fairness That Due Process Seeks To Achieve.

A basic requirement of due process is that it comport with proper standards of fairness. This Court has stated that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). In instances where the public confidence in the justice system is compromised, this Court has declined to apply the harmless error doctrine. *See e.g., Young v. United States*, 481 U.S. 787, 814 (1987) (refusing to apply non-constitutional harmless error analysis where an interested prosecutor was appointed).

After suffering delays ranging from two years, two months to seven years, two months (and an average of four years, three months) the twenty-nine consolidated Petitioners can point to two known causes for the delay in their appeals. First, if their post-trial delay was suffered after their cases were docketed at the NMCCA, the shortage of adequate appellate defense counsel was partly to blame. *Diaz*, 59 M.J. at 38. Second, if their delays were suffered before their cases were docketed, the delay at that level was so systemic that the CAAF implemented rigid standards for processing future cases. *Moreno*, 53 M.J. at 142. In either case, the question of fairness is raised and the need to assuage public concern for the lack of appearance of justice must be alleviated.

The CAAF did seek to alleviate the "appearance of justice" concern but only when addressing the statutory due process test for post-trial delay. In *Toohey II* the CAAF found that the inordinate delay in that case negatively impacted the public's perception. *Toohey II*, 63 M.J. at 362. But the CAAF's finding did not affect its own constitutional due process analysis because the statutory test can only be implemented by service courts. The statutory test is inherent in the service courts' Article 66(c), UCMJ review. The CAAF has stated that the statute "calls for, if anything, even greater diligence and timeliness than is found in the civilian system." *Diaz*, 59 M.J. at 39. Military service courts are required to review an appellant's case and approve only the findings and sentence that "should be approved." Article 66(c), UCMJ. And, if a service court finds excessive post-trial delay, a service court can grant sentence relief without the finding of prejudice. *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

But the statutory test only contains amorphous language that limits service courts to a generalized review of statutory due process violations, without an indication of how to test for those violations or what remedies to apply. *Cf. Zedner v. United States*, 2006 U.S. LEXIS 4509, 126 S. Ct. 1976 (2006) (harmless error not applicable where Speedy Trial Act dictated remedy for violation). Contrastingly, the constitutional due process framework for post-trial delay does set forth a test. And, most important, is directly applicable to the CAAF.

Yet, the "public perception" factor is absent from the CAAF's own constitutional due process review. In *Toohey II*, the CAAF instructed service courts that "tolerating [the delay in appellant's case] would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey*, 63 M.J. at 362. But, the same public perception that the CAAF recognized in a non-constitutional due process test did not factor into its own constitutional due process test.

The fact that an "appearance of justice" is compromised is recognized by the CAAF's finding that there is a public perception problem with post-trial delay. But the CAAF failed to address the issue in its constitutional due process analysis. Instead, the CAAF's novel use of the harmless error doctrine serves to aggravate the public's perception because the harmlessness of Petitioners' due process violations realistically cannot be gauged.

II. A SPEEDY POST-TRIAL DUE PROCESS VIOLATION REQUIRES THE APPLICATION OF A REMEDY ONCE A VIOLATION IS FOUND.

All federal circuit and district courts, once they have found a violation of the due process right to a speedy appeal, end the analysis and immediately focus on a remedy for the constitutional violation. *Simmons*, 44 F.3d at 1170-71 (granting relief for thirteen-year delay between conviction and direct appeal); *Ward v.*

Freeman, 1995 U.S. App. LEXIS 2304 at 5 (granting relief for fifteen-year delay between conviction and direct appeal); *Simmons*, 898 F.2d at 868 (allowing Appellant to pursue damages under 42 U.S.C § 1983 for six-year delay between conviction and direct appeal); *Brooks v. Jones*, 875 F.2d 30, 31 (2d Cir. 1989) (granting relief for eight-year delay between conviction and direct appeal); *Burkett v. Cunningham*, 826 F.2d 1208, 1225 (3d Cir. 1987) (granting relief for six-year delay between conviction and direct appeal); *Mathis v. Hood*, 1990 U.S. Dist. LEXIS 8474, 5, 24 (S.D.N.Y. 1990) (granting relief for six-year delay between conviction and direct appeal), *aff'd* 937 f.2d 790 (2d Cir. 1991); *Washington v. Sobina*, 387 F. Supp. 2d 460, 474, 476-77 (E.D. Pa. 2005) (granting relief for six- year delay between conviction and direct appeal); *Brown v. Costello*, 2004 U.S. Dist. LEXIS 16159, 11 (S.D.N.Y. 2004) (allowing Appellant to pursue damages under 42 U.S.C § 1983 for six-year delay between conviction and direct appeal); *Collins v. Rivera*, 1999 U.S. Dist. LEXIS 20704, 19 (W.D.N.Y. 1999) (granting relief for a two-year delay between conviction and direct appeal); *Serrano v. Portuondo*, 1999 U.S. Dist. LEXIS 10216, 12-14, 17-18 (S.D.N.Y. 1999) (allowing Appellant to pursue damages under 42 U.S.C § 1983 for a fifteen-year delay between conviction and direct appeal); *Cameron v. Lefevre*, 887 F. Supp. 425, 434-35 (E.D.N.Y. 1995) (granting relief for four-year delay between conviction and direct appeal); *Einaugler v. Dowling*, 862 F. Supp. 793, 800-01 (E.D.N.Y. 1994) (granting relief for thirteen-month delay between conviction and direct appeal); *Wallace v. Leonardo*, 827

F. Supp. 150, 158 (W.D.N.Y. 1993) (allowing Appellant to pursue damages under 42 U.S.C § 1983 for a delay of eleven years and three months between conviction and direct appeal); *Hampton v. Kelly*, 1988 U.S. Dist. LEXIS 13999, 4-6 (E.D.N.Y. 1988) (granting relief for a thirty-nine month delay between conviction and direct appeal), *appeal dismissed*, 876 F.2d 890 (2d Cir. 1989); *Jacob v. Henderson*, 1987 U.S. Dist. LEXIS 14137, 7-8 (E.D.N.Y. 1989) (granting relief for a two and a half year delay between conviction and direct appeal).

The remedies considered by the courts above are usually limited, that is they fall short of the sole constitutional remedy for a violation of the Sixth Amendment speedy trial right – dismissal of the indictment. *See Strunk*, 412 U.S. at 439-40. Nonetheless, the remedies employed by the district and circuit courts serve both to reinforce society's perception that the appellate process is fair, timely and legitimate, and to ensure that longstanding patterns of delay are not repeated.

The CAAF's orders and reasoning for denying Petitioners immediate relief, despite finding a constitutional due process violation in their cases, stands in contrast to other jurisdictions. The barrier to relief for Petitioners is the CAAF's use of the harmless error doctrine.

In rare cases, such as *Toohey II*, the harmless error standard has not hindered relief. But most often it does. Even in some cases where a due process violation has

been found to not be harmless beyond a reasonable doubt, the CAAF has refused to remedy the violation out of concern that "to fashion relief that would be actual and meaningful . . . would be disproportionate to the possible harm generated from the delay." *United States v. Rodriquez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006). Thus, appellants cannot hope to gain immediate relief even if they meet the more stringent harmless error test that the CAAF has designed. Now a showing that meaningful relief will not be disproportionate to the harm suffered must be made.

If the appellate rights of military service members are to comport with the requirements of constitutional due process, the redundancies and inefficiencies that CAAF has introduced through its strained analysis cannot exist. Instead, immediate relief must be provided once a post-trial delay due process violation is determined.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD D. BELLISS
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December 11, 2006

Supreme Court, U.S.
FILED

06-802 DEC 11 2006

OFFICE OF THE CLERK

No. ____

In The
Supreme Court of the United States

MICHAEL F. CRAIG, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Appendix A

UNITED STATES, Appellee

v.

Michael F. CRAIG, Staff Sergeant (E-6), U.S. Marine Corps, Appellant

No. 05-0278/MC

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200301772

September 11, 2006, Ordered

Counsel for Appellant: Captain Rolando R. Sanchez, USMC.

Counsel for Appellee: LT Kathleen Helmann, JAGC, USNR.

On consideration of the granted and specified issues, in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), assuming that the Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in *United States v. Moreno*, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix B

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

W.L. RITTER C.L. SCOVEL M.J. SUSZAN

UNITED STATES

v.

Michael F. CRAIG
Staff Sergeant (E-6), U.S. Marine Corps

NMCCA 200301772 Decided 7 December 2004

Sentence adjudged 9 January 2001. Military Judge: S.A. Folsom. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st FSSG, MarForPac, Camp Pendleton, CA.

LCDR MARY MCALEVY, JAGC, USNR, Appellate Defense Counsel
Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate

Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

We have examined the record of trial, the appellant's assignment of error concerning post-trial processing delay, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *See* Articles 59(a) and 66(c), Uniform Code of Military Justice, 10 U.S.C. §§ 859(a) and 866(c).

We are cognizant of this court's power under Article 66(c), UCMJ, to grant sentence relief for excessive post-trial delay even in the absence of actual prejudice. *See United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Assuming the post-trial delay in this case is excessive, we do not find any prejudice or other harm to the appellant resulting from it, nor do we conclude that it affects the "findings and sentence [that] *'should be approved,'* based on all the facts and circumstances

reflected in the record." *Id.* (emphasis added). We therefore decline to grant relief on this basis, and affirm the findings of guilty and sentence, as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court

Appendix C

UNITED STATES, Appellee

v.

Cameron D. BOLES
Lance Corporal (E-3), U.S. Marine Corps

No. 06-0275/MC

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200102155

September 19, 2006, Ordered

Counsel for Appellant: LCDR Jason Grover, JAGC, USN.

Counsel for Appellee: LT Craig A. Poulson, JAGC, USNR.

On consideration of the petition for granted of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, and in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was

harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 19th day of September, 2006,

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in *United States v. Moreno*, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix D

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER D.A. WAGNER R.W. REDCLIFF

UNITED STATES

v.

Cameron D. BOLES
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200102155 Decided 26 May 2005

Sentence adjudged 19 October 2000. Military Judge: F.A. Delzompo. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Aircraft Wing, MCAS Miramar, San Diego, CA.

LT JASON GROVER, JAGC, USN, Appellate Defense Counsel
LT FRANK GATTO, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of conspiracy to commit rape and rape. Additionally, the appellant was convicted, consistent with his pleas, of making a false official statement. The appellant's offenses violated Articles 81, 107, and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, and 920. The appellant was sentenced to confinement for 2 years, total forfeiture of pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged. There was no pretrial agreement.

We have carefully examined the record of trial and the appellant's two assignments of error contending that he was denied his right to a speedy trial because the Government delayed in serving preferred charges upon him and that he was prejudiced by post-trial processing delay. We have also considered the Government's response.

We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *See* Articles 59(a) and 66(c), UCMJ.

Speedy Trial

The appellant contends that he was denied his right to a speedy trial under Article 10, UCMJ, when 20 days passed between preferral and service of the charge upon him and 26 days passed to correct a procedural error. The appellant argues that he was prejudiced by this pretrial delay because he was placed in special quarters and was unable to "exercise and fell out of shape." Appellant's Brief of 21 Nov 2003 at 6. As a result, the appellant asserts that his ability to pursue a good military character defense was adversely impacted. *Id.* at 7. We disagree.

Once an accused is placed in pretrial confinement, immediate measures must be taken to notify him of the charges against him and either bring him to trial or dismiss the charges. Art. 10, UCMJ. Although the government is required to exercise reasonable diligence in bringing an accused to trial, proof of constant motion is unnecessary. *Unite States v. Kossman,* 38 M.J. 258, 262 (C.M.A. 1993). On appellate review, we give substantial deference to the factual findings of the military judge. *See United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999). We are required to consider: (1) the length of the delay; (2) the reasons for the delay; (3) the assertion of the right to speedy trial; and (4) the existence of prejudice. *See United States v. Birge,* 52 M.J. 209, 212 (C.A.A.F. 1999)(quoting *Barker v. Wingo*, 407 U.S. 514, 530 (1972). We should also consider such factors as: (1) did the appellant enter pleas of guilty, and if so, was it pursuant to a pretrial

agreement; (2) was credit awarded for pretrial trial conferment on the sentence; (3) was the Government guilty of bad faith in creating the delay; and (4) did the appellant suffer any prejudice to the preparation of his case as a result of the delay. *Id.*

Applying these factors, we find no speedy trial violation pursuant to Article 10, UCMJ. We begin by noting that the complained of 46-day delay was minimal and that the appellant received appropriate credit for all the pre-trial confinement he served. Additionally, although the appellant requested to be released from pretrial confinement, he made no specific request for a speedy trial prior to arraignment. We also find that "there is no evidence of willful or malicious conduct on the part of the Government to create the delay". *Birge*, 52 M.J. at 212. Finally, we find no specific disadvantage or prejudice to the appellant's trial preparation resulting from the delay in serving preferred charges upon him or in correcting a referral error.

Having carefully examined the record of trial, including the extensively litigated pretrial motion, we hold that the military judge's findings are supported by the record and adopt them as our own. Appellate Exhibits VI, X; Record at 135-43. We also concur with his conclusion that the Government acted with "reasonable diligence" in bringing the appellant to trial. *See Kossman,* 38 M.J. at 262. Thus, this assignment of error is without merit.

Post-Trial Processing Delay

The appellant also contends that he was denied speedy post-trial review of his conviction because 458 days passed before the record of trial was docketed with this Court. As a result, he requests that we disapprove his dishonorable discharge and substitute a bad-conduct discharge. We decline to do so.

In determining if post-trial delay violates the appellant's due process rights, we consider four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* __ M.J. __ (C.A.A.F. May 10, 2005)(citing *Barker v. Wingo,* 407 U.S. at 530). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Jones*, slip. op, at 8. Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.,* slip op. at 9.

Here, there was a delay of 458 days from the date of sentence to the date the six volume record of trial was docketed with this court for review. We find that the unexplained delay alone is facially unreasonable, triggering a due process review. Since there are no explanations for the delay in the record, we look to the third and fourth factors. We find no assertion of the right to a timely appeal, nor do we find any claim or

evidence of prejudice. Thus, we conclude that there has been no due process violation due to the post-trial delay. We are also aware of our authority to grant relief under Article 66, Uniform Code of Military Justice, 10 U.S.C. §§ 866, but we decline to do so. *Id.; United States v. Oestmann*, __ M.J. __ (C.A.A.F. May 10, 2005); *United States v. Toohey*, 60 M.J. 100 (C.A.A.F. 2004); *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

Appendix E

UNITED STATES, Appellee

v.

Charles M. BRICKER, Aviation Machinist's Mate First Class (E-6), United States Navy, Appellant

No. 05-0709/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200001970

September 11, 2006, Ordered

Counsel for Appellant: Captain Rolando R. Sanchez, USMC.

Counsel for Appellee: Captain Roger E. Mattioli, USMC.

On consideration of the specified issue, in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), assuming that the Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in *United States v. Moreno*, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix F

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

BEFORE

Charles Wm. DORMAN, C.A. PRICE, R.C. HARRIS.

UNITED STATES

v.

Charles M. BRICKER, Aviation Machinist's Mate First Class (E-6), United States Navy, Appellant

NMCCA 200001970 Decided 27 June 2005

Sentence adjudged 29 June 2000.
Military Judge: D.M. White.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silverdale, WA.

MAJ PHILLIP D. SANCHEZ, USMC, Appellate Defense Counsel.

CAPTAIN ROLANDO R. SANCHEZ, USMC, Appellate Defense Counsel.

MAJ RAYMOND E. BEAL II, USMC, Appellate Government Counsel.

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARRIS, Judge:

The appellant was tried by a general court-martial composed of a military judge, sitting alone. Contrary to his pleas, the appellant was convicted of committing an indecent act with a child under the age of 16 years, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for 18 months and a bad-conduct discharge. The military judge recommended that the convening authority suspend the bad-conduct discharge and confinement in excess of 5 months for 3 years and, if requested, defer and suspend[1] automatic forfeitures. The convening authority approved the adjudged sentence and, except for the bad-conduct discharge, ordered the punishment executed.

After carefully considering the record of trial, the appellant's three assignments of error, and the Government's response, we conclude that the findings and the sentence are correct in law and fact and that no

---

[1] We presume that the military judge misspoke, intending to say, "waive," since automatic forfeitures cannot be suspended. *United States v. Emminizer*, 56 M.J. 441, 443 (C.A.A.F. 2002).

error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Sufficiency of Evidence

In the appellant's first assignment of error, he asserts that the Government failed to offer factually and legally sufficient evidence to prove that the appellant had any indecent intent towards the victim. The appellant avers that this court should set aside his conviction. We disagree.

This court has an independent statutory obligation to review each case *de novo* for legal and factual sufficiency, and may substitute its own judgment for that of the trial court. *See* Art. 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found that all the essential elements were proven beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)(citing *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41; *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. In exercising the duty imposed by this "awesome, plenary power," *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990), this court may judge the

credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge or court-martial members. Art. 66(c), UCMJ.

To support a conviction for committing an indecent act with a child under the age of 16 years, the Government must establish the following five elements beyond a reasonable doubt:

(1) That the [service member] committed a certain act upon or with the body of a certain person;

(2) That the person was under the age of 16 years and not the spouse of the [service member]:

(3) That the act of the [service member] was indecent;

(4) That the [service member] committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the [service member], the victim, or both; and

(5) That, under the circumstances, the conduct of the [service member] was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, P 87b(1).

We have carefully examined all of the evidence admitted

on the merits. We conclude that the evidence is both legally and factually sufficient on each and every element of the offense of committing an indecent act with a child under the age of 16 years. We are therefore convinced, beyond a reasonable doubt, that the appellant is guilty of this offense. As such, we decline to grant relief.

Ineffective Assistance of Counsel

In the appellant's second assignment of error, he asserts that he was denied his Sixth Amendment right under the U.S. Constitution to effective assistance of counsel when his trial defense counsel failed to call witnesses during sentencing and failed to present financial impact evidence regarding his potential loss of retirement benefits. The appellant avers that this court should set aside his sentence and remand his case for a new sentencing hearing. We disagree.

A military accused enjoys the right to effective assistance of counsel in sentencing hearings. *See United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000). To prevail on such a claim, however, an accused must satisfy the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), and demonstrate: (1) "a deficiency in counsel's performance that is 'so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment'; and (2) that the deficient performance prejudiced the defense [through] errors . . . so serious as to deprive the defendant of a fair

trial, a trial whose result is reliable." *See Alves*, 53 M.J. at 289; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987).

Under the deficiency prong, "the competence of counsel is presumed." *Scott*, 24 M.J. at 188. This presumption is overcome if the counsel's performance falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Reasonableness is "evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Scott*, 24 M.J. at 188.

At the time of trial, the appellant had 17 years of service in the Navy. The appellant insists that his trial defense counsel was constitutionally ineffective when he failed to investigate and present the economic impact a punitive discharge would have on the appellant after 17 years of military service, and failed to call sufficient witnesses to testify for him. Specifically, the appellant insists that his trial defense counsel was constitutionally deficient in that he failed to present sufficient evidence of rehabilitation, mitigation, and extenuation.

To determine whether the "presumption of competence has been overcome," our superior court has outlined a three-part inquiry:

(1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions?"

(2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance (ordinarily expected) of fallible lawyers?" and

(3) If a defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result.
United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991), *appeal after remand aff'd*, 59 M.J. 245 (C.A.A.F. 2004). Applying this test, we are of the opinion that the appellant has not overcome the presumption of competence.

The appellant contends that his trial defense counsel "failed to present mitigation evidence concerning the financial impact caused by a bad[-]conduct discharge." Appellant's Brief of 30 Apr 2004 at 13. The appellant relies on *United States v. Greaves*, 46 M.J. 133, 138 (C.A.A.F. 1997)(concluding that loss of retirement pay is the "critical" factor for determining the appropriate sentence). However, the appellant's assertion has failed to rebut the strong presumption of competency attached to his trial defense counsel's representation.

First, the appellant has failed to show that the military judge did not consider evidence of the potential loss of future potential retirement benefits during his sentencing case. The appellant was nearly 3 years away from retirement at the time of his court-martial. Therefore, regardless of the outcome of the appellant's court-martial, the potential benefits of future retirement were not guaranteed. Further, a military judge can be presumed to be aware that retirement entails substantial monetary benefits. As such, we find no prejudice in the appellant's case despite the omission.

With regard to the appellant's attack on his trial defense counsel's presentation of a sentencing case, that attack is not well-taken. In fact, his trial defense counsel put on a considerable sentencing case on the appellant's behalf. Further, the appellant has failed to identify the witnesses, i.e., military character witnesses he would have called concerning his good military character or what their testimony would have been, what other evidence he would have provided through written statements, and why he did not present these matters in addition to those he presented to the convening authority before he took his action.

We conclude that the appellant has failed to overcome the presumption that his trial defense counsel provided competent assistance and, further, has failed to show there is a reasonable probability that, absent the alleged errors, "there would have been a different result." *Gilley* 56 M.J. at 124. As such, we decline to grant relief.

Sentence Appropriateness

In the appellant's third assignment of error, he asserts that his sentence, which includes an unsuspended bad-conduct discharge, is inappropriately severe given the nature of the offense and the character of the offender. The appellant avers that this court should set aside the bad-conduct discharge. We disagree.

A court-martial is free to impose any legal sentence it deems appropriate. *United States v. Turner*, 14 C.M.A. 435, 34 C.M.R. 215, 217 (C.M.A. 1964); RULE FOR

COURTS-MARTIAL 1002, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). On review, a court of criminal appeals "may affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ. Further, courts of criminal appeal are tasked with determining sentence appropriateness vice granting clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); R.C.M. 1107(b). Clemency, which involves bestowing mercy, is the prerogative of the convening authority. An appropriate sentence results from an "individualized consideration" based on "the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

The record of trial well-supports the appropriateness of the appellant's sentence. We are confident that the appellant received the individualized consideration required based on the seriousness of his offense and the nature of his character -- that is all that the law requires. The appellant's assignment of error amounts to nothing more than a request for clemency, which is the prerogative of the convening authority. *Healy*, 26 M.J. at 395-96; R.C.M. 1107(b). In this regard, the convening authority considered the appellant's request for clemency before taking action on the appellant's case. As such, we decline to grant relief.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Chief Judge DORMAN and Senior Judge PRICE concur.

Appendix G

UNITED STATES, Appellee

v.

Salvador DIAZ
Chief Fire Controlman (E-7), U.S. Navy

No. 05-0500/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200200374

September 11, 2006, Ordered

Counsel for Appellant: LT Stephen C. Reyes, JAGC, USNR.

Counsel for Appellee: MAJ Kevin C. Harris, USMC.

On consideration of the granted issue, in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in United States v. Moreno, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix H

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

Charles Wm. DORMAN C.L. SCOVEL M.J. SUSZAN

UNITED STATES

v.

Salvador DIAZ
Chief Fire Controlman (E-7), U.S. Navy

NMCCA 200200374

Sentence adjudged 1 December 2000. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northeast,
Naval Submarine Base New London, Groton, CT.

LT COLIN KISOR, JAGC, USNR, Appellate Defense Counsel

LT FRANK GATTO, JAGC, USNR, Appellate Government Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was tried before a general court-martial composed of officer and enlisted members. Contrary to his pleas, the appellant was convicted of three specifications of raping his 12-year-old daughter, and two specifications of indecent acts upon her. The appellant's crimes violated Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The adjudged and approved sentence consists of a dishonorable discharge, confinement for 9 years, forfeiture of all pay and allowances, and reduction to pay grade E-1.

On 10 June 2004, we issued a decision in this case. In that decision, we determined that the evidence of record was both legally and factually sufficient to support the appellant's conviction of all offenses of which he had been found guilty. We, however, were unable to resolve an issue raised by the appellant concerning conflict of counsel. We thus returned the record of trial to the Judge Advocate General of the Navy, authorizing a hearing under *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), to answer specific questions concerning the conflict of counsel issue. That hearing was conducted on 29 and 30 July 2004, and the case has now been returned to this court for completion of appellate

review pursuant to Article 66(c), UCMJ.

We have reviewed the record of trial and the appellant's eighteen assignments of error (AOE) raised by the appellate defense counsel, which are as follows:

> I. APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFLICT-FREE COUNSEL WAS VIOLATED WHEN THE MILITARY JUDGE ALLOWED, WITHOUT OBTAINING A VALID WAIVER BY APPELLANT, THE DETAILED DEFENSE COUNSEL TO REPRESENT APPELLANT DESPITE HIS INFORMING THE COURT OF A CONFLICT OF INTEREST AFFECTING THE REPRESENTATION.
>
> II. APPELLANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS DEFENSE COUNSEL INTRODUCED NO EVIDENCE AS TO APPELLANT'S GOOD MILITARY CHARACTER.
>
> III. THE MILITARY JUDGE ERRED IN ALLOWING THE GOVERNMENT TO SELECT

WHICH ONE OF THE RELEVANT AND NECESSARY DEFENSE WITNESSES WOULD NOT BE PRODUCED BASED ON THE COST OF PRODUCTION.

IV. THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING THE DEFENSE CHALLENGE OF LT MCGEE FOR CAUSE.

V. THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING THE DEFENSE CHALLENGE OF SENIOR CHIEF LASHER FOR CAUSE.

VI. THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING THE DEFENSE CHALLENGE OF SENIOR CHIEF DEAN FOR CAUSE.

VII. THE MILITARY JUDGE ABUSED HIS DISCRETION IN PERMITTING THE GOVERNMENT TO PRESENT IRRELEVANT AND CONFUSING EXPERT TESTIMONY IN ORDER TO RECOVER FROM THE DAMAGING AND FACT-

UALLY ERRONEOUS TESTIMONY OF ITS OWN WITNESS.

VIII. THE MILITARY JUDGE ABUSED HIS DISCRETION IN NOT ALLOWING THE DEFENSE COUNSEL TO IMPEACH EMILY DIAZ WITH HER PRIOR INCONSISTENT STATEMENT.

IX. THE MILITARY JUDGE ERRED IN DECLINING TO INSTRUCT THE MEMBERS THAT APPELLANT'S CHARACTER FOR TRUTHFULNESS COULD BE CONSIDERED BY THE MEMBERS IN DETERMINING HIS INNOCENCE TO THE RAPE CHARGE.

X. APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS TO SPEEDY APPELLATE REVIEW WERE VIOLATED IN THIS CASE.

XI. THE GOVERNMENT FAILED TO PROVE THE CRIME OF RAPE BEYOND A REASON-

ABLE DOUBT.

XII. THE WITHDRAWAL OF THE CHARGES FROM A SPECIAL COURT-MARTIAL AND REFERRAL OF THE CHARGES TO A GENERAL COURT-MARTIAL WITHOUT AN EXPLANATION VIOLATED R.C.M. 604.

XIII. THE CONVENING AUTHORITY IMPROPERLY REFERRED THE CHARGES TO A GENERAL COURT-MARTIAL.

XIV. THE ARTICLE 32 INVESTIGATION CONDUCTED IN THIS CASE WAS FATALLY DEFICIENT AND THE CHARGES WERE REFERRED TO A GENERAL COURT-MARTIAL NOTWITHSTANDING APPELLANT'S TIMELY DEMAND FOR A PROPER ARTICLE 32 INVESTIGATION.

XV. APPELLANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN

THAT HE WAS TRIED BY A PANEL OF FEWER THAN TWELVE MEMBERS.

XVI. ARTICLE 52, UCMJ, IS UNCONSTITUTIONAL AS APPLIED TO APPELLANT'S CASE IN THAT IT ONLY REQUIRED CONCURRENCE OF TWO-THIRDS OF THE MEMBERS TO CONVICT APPELLANT.

XVII. APPELLANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT THE COURT-MARTIAL PROCESS.

XVIII. THE MILITARY JUDGE ABUSED HIS DISCRETION IN PREVENTING THE PROPER CROSS-EXAMINATION OF NCIS AGENT DEGNAN.

Appellant's Brief of 16 Oct 2003 at ii and iii. We have also considered the Government's response, the Reply Brief filed by the appellate defense counsel, as well as the Appellant's Supplemental Reply Brief submitted *pro se* pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Additionally, we have reviewed the pleadings submitted by both the appellant and Government after completion of the *DuBay* hearing, as

well as the record of that hearing. Following our thorough review of all these materials, we conclude that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. *See* Arts. 59(a) and 66(c), UCMJ.

Statement of Facts

At the time of trial the appellant was a 47-year-old chief petty officer with over 20 years in the Navy. The victim in this case is his natural daughter, who was born in October 1985. She provided the principal evidence against the appellant. She testified that the appellant began to sexually abuse her in March 1998, when the family was living in Pemberton, NJ, and continued until just before she reported the abuse in July 1999. At that time the family had moved to government quarters aboard Naval Weapons Station (NWS), Earle, NJ. The appellant had been married to the victim's mother, but they divorced after the mother abandoned the family.

The abuse began in the family's two-story home in Pemberton. Prior to the abuse, the victim had been sharing a room with one of her older sisters. When another sister moved out of the house, the victim moved into a downstairs bedroom located across from the appellant's bedroom. The victim would frequently sleep in the same bed with the appellant. The first incident occurred on one such evening. The victim testified that she believed the appellant thought she was sleeping when he put his arm around her and felt her body

through her clothes. He then put his hand inside her clothes and rubbed her vagina for about 10 minutes. They did not discuss what had happened. She also testified that after this incident the appellant repeated the same sort of conduct about every other night. She began to spend more nights in her own room. Although the appellant kept his clothes on during these touchings, the victim could tell that he was aroused because she could feel his erect penis against her leg. This activity continued until the victim told her aunt, the appellant's sister, that the appellant had been touching her inappropriately. The aunt let the victim go home with the appellant on the same evening that the victim had reported the abuse to her. At that time, the appellant told the victim that if she wanted him to stop touching her, all she needed to do was to tell him. The victim responded, telling the appellant to stop, and the touching ceased until after the family moved to NWS Earle.

The appellant, the victim, and one other sibling moved to NWS Earle in March 1999, and the appellant began to touch the victim again, this time rubbing her breasts. At one point the appellant told the victim that he was doing this to keep her away from boys. He explained that if he took care of her at home she would not go looking for boys at school or on the streets. She also testified that the touching escalated to sexual intercourse at Earle. She testified that the appellant had sexual intercourse with her three times in the quarters at Earle, twice in the appellant's bedroom and once in the living room. The victim was scared, confused, and embarrassed. They did not talk about what happened. All sexual activity

between the two of them stopped after the victim walked to the medical clinic on base and reported the appellant's actions.

The appellant testified on his own behalf. During his testimony he admitted that he had fondled the victim's breasts and had digitally penetrated her vagina. He also acknowledged that the touching could have occurred as often as twice a week. He further testified that he did not do this to satisfy his sexual desires, but rather because he believed that the victim was becoming sexually promiscuous. The appellant denied having had sexual intercourse with his daughter. On questioning by the court members, the appellant testified, "I felt, if my daughter learned the right approach to sex with me, it was much more efficient than learning it from some kid on the street, that I knew, . . . just wanted to have another benchmark on his bedpost or something." Record at 747. He also testified that he did not explain to his daughter why he was touching her, but that he told her, "'[w]hat I'm doing is wrong. It's against the law, but I want you to understand that this is being done, so you don't get involved with other children of your age.'" *Id.* at 751.

Sufficiency of the Evidence

In the appellant's eleventh AOE, he asserts that the evidence is insufficient to prove that he raped his daughter. We have once again carefully considered this issue, as well as the sufficiency of evidence with respect to the allegations that the appellant committed indecent

acts upon his daughter. The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Without question, with regard to the three specifications of rape and the two specifications of indecent assault, that standard is met.

The test for factual sufficiency is more favorable to the appellant. It requires this court to be convinced of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)(citing *United States v. Steward*, 18 M.J. 506, 508 (A.F.C.M.R. 1984)). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So too may we.

In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. Based on that review, we are convinced beyond a reasonable doubt of the appellant's guilt of the charged offenses. We find the testimony of the victim to be

credible and consistent. While true that the victim gave differing versions of the appellant's culpability prior to reporting his criminal conduct to authorities, she had a reasonable explanation for her earlier "stories." Furthermore, her testimony concerning the indecent acts is generally corroborated by the appellant's own testimony. Although the appellant asserts that when he touched the victim's breasts and penetrated her vagina with his fingers he had no intent to gratify his sexual desires, and although he presented character evidence that he is a truthful person, we find the appellant's testimony disingenuous and unworthy of belief. Furthermore, we credit the testimony of the victim in this case, and we find that the evidence of record is both legally and factually sufficient to support the appellant's conviction on all charges and specifications.

Conflict of Interest/Effective Assistance of Counsel

In the appellant's first AOE and in his briefs filed after the *DuBay* hearing, the appellant argues that he was denied his Sixth Amendment right to be represented by attorneys who did not labor under a conflict of interest. In the appellant's second and seventeenth AOE's, he alleges that he was denied effective assistance of counsel. Additionally, the appellant himself raises issues of the adequacy of his representation in his *pro se* filing of 19 December 2003. In that filing the appellant specifically alleges that his attorneys were inadequately prepared to defend him.

At the first Article 39(a), UCMJ, session of the

appellant's court-martial, the trial defense counsel informed the military judge of a potential conflict of interest in the case. During pretrial discovery the Government provided to the appellant information suggesting that the appellant assaulted a female petty officer, Petty Officer F. The trial defense counsel informed the military judge that he had represented Petty Officer F on unrelated charges at her own court-martial, and that he was concerned the Government might attempt to offer evidence of the alleged assault if the appellant were to introduce evidence of good military character. The trial defense counsel also informed the military judge that if the Government was unwilling to agree not to use that evidence his client would "in all likelihood" dismiss the detailed defense counsel as well as the assistant defense counsel, who also was involved with Petty Officer F's court-martial. No ruling was made concerning the issue during that session of the trial.

At a subsequent Article 39(a), UCMJ, session, the Government raised a motion *in limine* seeking to have the military judge find that the detailed defense counsel did not have a conflict of interest. In answering the Government's motion, the appellant submitted an affidavit stating that:

> I am extremely concerned that my counsel feel unable to adequately represent me regarding any issues that involve the alleged assault of [Petty Officer F]. I know that I face severe punishment including life in

> prison if convicted. I do not want to be represented by lawyers who do not believe they can do their best job because of a conflict of interest.

Appellate Exhibit XIV. In litigating this motion, the Government made clear that if the appellant called witnesses to testify that he had good military character, it would ask the witnesses if they were aware that the appellant had assaulted Petty Officer F. The military judge found that the Government had a good faith basis for asking this question, that it could not offer extrinsic evidence to prove that the assault took place, and that Petty Officer F was not going to testify. The Government also indicated that it intended to ask good military character witnesses if they were aware the appellant had injured one of his other daughters and told her to lie about how she had been injured when she went to the hospital seeking medical treatment for the injury.

While the military judge did not state whether he believed there to be an actual a possible conflict of interest, he did state that he would permit the Government to ask defense character witnesses if they were aware that the appellant had assaulted Petty Officer F. Record at 43. With that ruling, the trial defense counsel informed the military judge that he would advise the appellant "of his right to dismiss us and request individual military counsel. . . ." *Id.* at 45. The military judge also advised the appellant of his right to request individual military counsel (IMC) to avoid any perceived conflict, and told the appellant that he needed to advise

the military judge the next day if he wanted IMC. *Id.* at 45-47. The military judge also stated that he found the conflict "to be kind of [an] extraneous issue," *id.* at 45, and that it was "fairly minimal," *id.* at 48. This Article 39(a), UCMJ, session ended on 30 October 2000. When the court-martial reconvened on 27 November 2000, the appellant did not raise the conflict of interest issue. It did, however, come up again.

Just prior to the members being instructed on findings, the appellant addressed the military judge concerning the fact that no evidence of his good military character had been presented. A fairly lengthy discussion ensued. *Id.* at 785-800. During this dialogue the military judge explained to the appellant that his counsel had tactical reasons for the way they handled the issue of good military character. The appellant specifically stated that he did not agree with their decision, noting his concern throughout the court-martial that evidence of his good military character was not introduced into evidence. The dialogue concluded with the military judge telling the appellant that he would not be allowed to represent himself, or to question witnesses on his own. The military judge then asked the defense if they wanted to either reopen their case to present the evidence or reopen to allow the appellant to retake the stand. The defense declined both offers. *Id.* at 801.

In our decision of 10 June 2004 we expressed our concern about the failure of the two trial defense counsel to introduce evidence of the appellant's good military character. We also found that the record failed to

provide sufficient information for us to determine whether his attorneys had labored under a conflict of interest that adversely impacted their ability to provide the appellant with effective representation. To address these issues we authorized a *DuBay* hearing, specifically asking the military judge conducting the hearing to address the following issues:

> (1) whether there was an **actual** conflict of interest in the appellant's court-martial; (2) if there was an actual conflict of interest, whether it adversely affected counsel's representation of the appellant -- focusing on the question of why no evidence of the appellant's good military character was presented during the findings stage of the appellant's trial; and (3) if there was an actual conflict of interest, whether the appellant intended to waive the conflict.

United States v. Diaz, No. 200200374, unpublished op. (N.M.Ct.Crim.App. 10 June 2004) at 7 (emphasis in original).

Following a two-day fact-finding *DuBay* hearing, the military judge found that the appellant's trial defense counsel had a "legitimate tactical reason . . . not to call good military character witnesses on the merits." Essential Findings of Fact and Ruling dated 24 Sep 2004

at 5. The military judge also found that "[t]here was **no actual conflict of interest** in appellant's court-martial." *Id.* (emphasis in original).

In the case before us, we were initially concerned by the absence of evidence of good military character on the merits. This concern was heightened by the comments of the two trial defense counsel and the appellant contained in the record of trial, and the failure of the military judge to adequately resolve the issue. Those issues and concerns have now been resolved. We have carefully reviewed the thorough *DuBay* hearing conducted in this case. During that hearing, both of the appellant's trial defense counsel were called as witnesses and asked to explain their trial strategy and tactics and their view of the conflict of interest issue. In essence, both counsel testified that the potential conflict of interest involving Petty Officer F resolved itself when the military judge ruled that the Government would not be allowed to present extrinsic evidence concerning the appellant's alleged assault upon Petty Officer F. They also testified that their decision not to present evidence of good military character was to prevent the Government from asking those witnesses if they had heard about the appellant's alleged assault upon one of his other daughters. In his post-*DuBay* pleadings, the appellant challenges the findings of fact of the military judge, alleging that the military judge abused his discretion in believing the testimonies of the two trial defense counsel.

The law is quite clear as to the standard of review we

must apply concerning this issue. "A military judge's fact-finding is reviewed under a clearly erroneous standard, and his conclusions of law are reviewed de novo." *United States v. Khamsouk*, 57 M.J. 282, 286 (C.A.A.F. 2002)(citing *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000)); *see also United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001)(concerning issue of effective assistance of counsel); *United States v. Spriggs*, 52 M.J. 235, 244 (C.A.A.F. 2000)(concerning whether an attorney-client relationship had been severed); *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997)(concerning issues of prosecutorial misconduct); *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997)(concerning determination regarding the effectiveness of counsel). Our superior court has also said that the findings of fact of a military judge are to be given "substantial deference and will be reversed only for clear error." *United States v. Edmond*, 41 M.J. 419, 420 (C.A.A.F. 1995)(quoting *United States v. Taylor*, 487 U.S. 326, 337 (1988)). In reviewing questions of fact, we are to "review the evidence 'in the light most favorable to the Government'. . . ." *United States v. Richter*, 51 M.J. 213, 221 (C.A.A.F. 1999)(quoting *United States v. Kitts*, 43 M.J. 23, 27-28 (C.A.A.F. 1995)). Finally, we note that just as the military judge is evaluating evidence when considering the question of guilt or innocence, when resolving any factual issue the military judge must be able to "believe one part of a witness' testimony and disbelieve another." *Harris*, 8 M.J. at 59.

The substantive law is also clear. A military accused has

a constitutional right to the effective assistance of counsel. Included within that right is the right to an attorney who is not encumbered by a conflict of interest with other clients. *United States v. Henry*, 50 M.J. 647, 651 (N.M.Ct.Crim.App. 1999)(citing *United States v. Carter,* 40 M.J. 102, 105 (C.M.A. 1994)). But even in cases where a single attorney is representing individuals charged with the same crime, that fact alone does not necessarily give rise to a conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). In cases of "multiple representation," while it is not necessary to demonstrate prejudice in order to obtain relief, an appellant must demonstrate that he objected at trial and that the "conflict of interest actually affected the adequacy of his representation. . . ." *Id.* at 348-50. Prejudice is presumed "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Burger v. Kemp*, 483 U.S. 776, 783 (1987)(quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984)). In *Mickens v. Taylor*, 535 U.S. 162, 175 (2002), the Supreme Court once again noted that a defendant is not entitled to relief until he "'shows that his counsel *actively represented* conflicting interests'. . . ." (quoting *Sullivan*, 446 U.S. at 350)(emphasis in original). The Court also cautioned against an "unblinking" application of the *Sullivan* presumption of prejudice standard in all conflict of interest cases. *Id.* at 174.

Our superior court has stated that in resolving conflict of interest issues there are four questions that must be

examined. "Was there [successive] representation? If so, did it give rise to an actual conflict of interest? If so, did appellant knowingly and intelligently waive his right to conflict-free counsel? If not, did the conflict have no adverse effect on counsel's representation of appellant?" *United States v. Smith*, 44 M.J. 459, 460 (C.A.A.F. 1996)(citing *United States v. Smith*, 36 M.J. 455, 457 (C.M.A. 1993)). In answering these questions, we give deference to the findings of fact reached by the military judge following the *DuBay* hearing. We give deference to those findings because, following our examination of the verbatim record of the *DuBay* hearing, we conclude that the findings of fact are not clearly erroneous and are supported by the record. While the appellant asserts that there are some inconsistencies in the testimonies of the two trial defense counsel at the *DuBay* hearing when compared to statements they made during the appellant's court-martial, given the lapse of time between the two hearings, some inconsistencies would be expected. A military judge is routinely called upon to resolve inconsistencies in testimony when making findings of fact and/or decisions of guilt or innocence. *See Harris*, 8 M.J. at 59. While the appellant may disagree with the findings of fact, the inconsistencies in testimony with those findings do not render the findings of fact an abuse of discretion. We adopt the findings of fact issued by the military judge on 24 September 2004 as our own. We also hold that none of the alleged inconsistencies in the statements of counsel are material to resolution of this case.

We then look to the findings of fact to answer the four

questions posed in *Smith*. First, there was successive representation in this case. LT Attanasio, the appellant's lead defense counsel, represented Petty Officer F at an earlier court-martial. While the appellant's court-martial was pending, Petty Officer F made allegations that the appellant had assaulted her. LT Attanasio was concerned that the appellant might be charged with that assault, and he readily recognized the potential for a conflict of interest. Thus, in the sense that LT Attanasio had represented Petty Officer F and was then faced with the possibility of representing the appellant in a case where Petty Officer F may be called as a witness against the appellant there was successive representation. Second, this successive representation did not give rise to an actual conflict of interest because the appellant was never charged with the assault upon Petty Officer F, and because LT Attanasio was never placed in a position where he had to represent the interests of one client over the other. Third, it is clear from the record that the appellant did not waive any conflict of interest that his defense team may have had to deal with concerning Petty Officer F. But, since there was no actual conflict, waiver is of no consequence. Finally, the potential conflict had no adverse effect on the representation provided to the appellant by his defense team. As they explained during the *DuBay* hearing, even if they were not faced with the Petty Officer F assault, they would not have presented evidence of good military character for tactical reasons, because they did not want the Government to be able to ask those character witnesses if they were aware that the appellant had assaulted one of his other daughters.

Following our review of the facts and our application of the controlling case law, we conclude that there was no actual conflict of interest in this case. We also conclude that the potential for a conflict of interest did not adversely affect the representation the appellant received from LT Attanasio or from LT Eberting, the assistant defense counsel. In light of these conclusions, it is not necessary to discuss or resolve issues concerning what advice the appellant was provided by his defense counsel concerning this issue, or what steps the counsel took to avoid the conflict. We note, however, that the military judge provided extensive advice to the appellant on the record concerning his right to conflict-free counsel. Were we to grant relief to the appellant on the basis of the illusory conflict of interest in this case, we would engage in the "unblinking" application of the *Sullivan* presumption of prejudice standard in all conflict of interest cases. *Mickens*, 535 U.S. at 174. We will not apply the standard in this manner.

The appellant also asserts that he was denied effective assistance of counsel. He specifically alleges that the failure of his counsel to present evidence of good military character on the merits deprived him of effective representation. He further alleges that his counsel were not adequately familiar with the facts of the case, did not adequately investigate and interview potential witnesses, and did not adequately cross-examine the victim. Appellant's Brief at 12-15, 48-50, and Appellant's *Pro Se* Supplemental Reply Brief of 19 Dec 2003 at 11-14.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth the standard for reviewing claims of ineffective assistance of trial defense counsel on appeal. The Court declared that:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. These standards are equally applicable before this court. *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). Moreover, in *Strickland*, the Supreme

Court reasoned that:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

466 U.S. at 689. We review allegations of ineffective assistance of counsel *de novo*. *United States v. McClain*, 50 M.J. 483, 487 (C.A.A.F. 1999)(citing *Wean*, 45 M.J. at 463).

In order to show ineffective assistance of trial defense counsel, an appellant "must surmount a very high hurdle." *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). When viewing tactical decisions by trial defense counsel, the test is whether such tactics were unreasonable under prevailing professional norms. *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004). It is strongly presumed that trial defense counsel is competent in the performance of representational duties. *Scott*, 24 M.J. at 188. To rebut the presumption of competence of trial defense counsel, the appellant is required to point to specific errors

committed by his trial defense counsel, which, under prevailing professional norms, were unreasonable. *Id.* (citing *United States v. Cronic*, 466 U.S. 648 (1984)). Further, the appellant must establish a factual foundation for a claim that his trial defense counsel's representation was ineffective. *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000). An appellant's "[s]weeping, generalized accusations will not suffice." *Id.* (citing *Moulton*, 47 M.J. at 229).

"Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency." *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001). We "strongly presume that [trial defense] counsel has provided 'adequate assistance.'" *United States v. Russell*, 48 M.J. 139, 140 (C.A.A.F. 1998)(quoting *Strickland*, 466 U.S. at 690). The appellant cannot overcome this presumption unless he can show that, absent the ineffective assistance of his trial defense counsel, there would have been a reasonable doubt respecting guilt. *United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991)
(citing *Scott*, 24 M.J. at 189).

Our superior court has held that trial defense "[c]ounsel have a duty to perform a reasonable investigation or make a determination that an avenue of investigation is unnecessary." *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002)(citing *United States v. Brownfield*, 52 M.J. 40, 42 (C.A.A.F. 1999)). Further, "[w]e do not look at the success of a . . . trial theory, but rather whether [trial defense] counsel made an objectively

reasonable choice in strategy from the alternatives available at the time." *Dewrell*, 55 M.J. at 136 (quoting *United States v. Hughes*, 48 M.J. 700, 718 (A.F.Ct.Crim.App. 1998)).

This court need not reach the question of deficient representation if we can first determine a lack of prejudice. *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004)(citing *Strickland*, 466 U.S. at 697); *United States v. Adams*, 59 M.J. 367, 371 (C.A.A.F. 2004)(citing *Strickland*, 466 U.S. at 697). In order to constitute prejudicial error, the appellant's trial defense counsel's deficient performance must render the result of the proceeding "unreliable" or "fundamentally unfair." *See United States v. Ingham*, 42 M.J. 218, 223 (C.A.A.F. 1995)(quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)).

We need not speculate as to why the trial defense team did not offer evidence of the appellant's good military character. As a result of the *DuBay* hearing, they have told us. Faced with the admissions the appellant had made to the criminal investigators, the trial defense team made a tactical decision to try to convince the members that the appellant was a truthful person -- that he was believable. They did not believe it to be in the best interest of their client to allow the Government to inject information into the record concerning the appellant's prior assault -- though not sexual in nature -- upon one of his other daughters. Had they offered evidence of good military character, the Government could have challenged the opinions of those witnesses by asking

them if they knew the appellant had injured one of his other daughters by assaulting her. *See United States v. Pruitt*, 46 M.J. 148 (C.A.A.F. 1997). We will not second-guess those tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993)(citing *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)).

Concerning the appellant's allegations that his counsel failed to adequately investigate his case, we have absolutely no evidence before us to suggest that either of the appellant's trial defense counsel failed to properly investigate the case. In light of the presumption of competence, as well as our evaluation of the trial performance of his counsel, we find that the appellant has failed to overcome the high burden to challenge the effectiveness of his representation on those grounds. Regarding the fact that his attorneys did not present evidence that the appellant did not rape or abuse his oldest daughter, we are unconvinced of the relevance of that "evidence." We note, however, that the appellant himself implicitly raised this issue when he testified that he started touching the victim because he did not want her to become promiscuous like his oldest daughter. Record at 734.

We have considered the appellant's arguments concerning the adequacy of his representation. We find that the appellant has failed to meet his burden in demonstrating that he was denied effective representation. But, even if there were shortcomings in the representation, we would not grant relief because we conclude that even if his counsel had done all the things

the appellant wanted them to do, the results of the trial would have been the same. The appellant's explanation of why he was regularly touching his daughter's breasts and vagina is so incredible that we are convinced beyond a reasonable doubt that no amount of good military character evidence, no additional investigation, no testimonials from other family members that the appellant did not sexually abuse or rape them, would have changed the outcome of this case. Without question, the appellant was afforded a fair court-martial, the results of which are reliable.

In conclusion, we do not find deficient representation by trial defense counsel under the *Strickland* standards. To the contrary, the trial defense team effectively represented the appellant at trial on all charges. To the extent that the trial defense team did not meet the appellant's standards, we find no prejudice.

Challenge for Cause

Subsequent to voir dire, the appellant challenged three members of the panel for cause, LT McGee, Senior Chief Lasher, and Senior Chief Dean. The military judge denied all three challenges. The appellant then exercised a peremptory challenge in a manner that preserved the issue for appellate review. See *United States v. Jobson*, 31 M.J. 117, 120 (C.M.A. 1990); RULE FOR COURTS-MARTIAL 912(f)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed). In AOE's IV, V, and VI, the appellant argues that the military judge erred in denying his challenges for cause

against these three members. We find no merit in these arguments.

For purposes of clarity, we include the relevant portion of the record of trial.

> MJ: Defense Counsel, any challenges for cause?
>
> DC: Yes, sir. We have three challenges for cause. First, sir, we challenge Lieutenant McGee, due to her background as a SAVI, Family Advocacy. She's had extensive dealings in the area of sexual complaints. It is impossible to predict what preconception she brings in. Merely 'cause a member mimics the correct answer, sir, does not relieve the challenge. We have an appearance problem here, too, with someone who has such a long history of--her duties, actually, involve these various types of allegations.
>
> MJ: Okay. Do you want me to rule on--Trial Counsel, what's your response?
>
> TC: Sir, Lieutenant McGee made clear, with her answers, that she

doesn't consider an allegation to be any more than an allegation. As she said, "There's always a truth behind it." I think--I think that cuts both ways of the defense's statement. But, I don't think anything from her answers would give credence to that statement. Basically, she's made quite clear, over and over again, that nothing with her experience as a SAVI, is going to influence her either way here. She's seen cases that are unsubstantiated, and we don't even know, maybe she hasn't seen any cases that were substantiated. I think she's pretty clear that she has an open mind in this position here.

MJ: Okay. I understand the government's position. What is—what is your next challenge for cause?

DC: So, the court's going to rule at the end, sir?

MJ: Yes.

DC: The next challenge for cause is Senior Chief Lasher. He previously served as a Chief

Master-at-Arms, in a law enforcement capacity. Additionally, his answers were hesitant during the--during the voir dire, particularly with respect to punishment considerations, with respect to the elements. We believe that, both, actual and implied bias exists here, Your Honor. And, given the liberal grant mandate, Your Honor, the court should certainly dismiss him.

MJ: I understand. Trial Counsel?

TC: Sir, I don't think we can look into hesitation before an answer as an implied bias. I mean, there's some pretty technical legal questions that were being asked of the Senior Chief, and understandably, he would be nervous. He sat there and he thought his answer out, and then he gave his answer. That doesn't mean he didn't necessarily agree with what he was saying, or giving a canned answer, a "canned answer." I just thought he took a minute, gathered his thoughts and he gave his answer. I don't think any inference can be drawn from

the fact that there is a hesitation. As far as him being a former master-at-arms, he made it quite clear that there was nothing there that was going to affect his ability to judge the evidence in this case fairly and impartially. To be quite honest, there wasn't anything of substance, in his experience, other than the fact that he did serve as a prior master-at-arms. So, I don't think that's any grounds for cause to--to strike the member from the jury.

MJ: Very well. I understand that. Your third, Lieutenant Attanasio?

DC: Yes. Senior Chief Dean. Sir, he was--additionally, we would--he was hesitant in his manner, in his answers to questions. Again, particularly, on the elements questions, which are central to the defense. And, because of that we, again, we believe an actual and implied bias does exist.

And, again, Your Honor, with respect to all three challenges we--we request the court to consider them within the strong

case laws' liberal grant mandate. Thank you, sir.

MJ: Okay. Members--I realize I wrote down--I realize I wrote down on--for the wrong--but Senior Chief--Senior Chief Dean, sat at this end, was the individual who--said his wife was--okay--again, could you go over Senior Chief Dean again? Again, I apologize. I just--because I wrote it down in the wrong space, but I----

DC: Yes, sir.

MJ: I entered Senior Chief Paul in Deans'----

DC: Yes, sir. The court's correct. Senior Chief Dean was, in fact, the individual whose ex-wife's sister was raped and murdered.

MJ: Tell me, again, what is the basis for----

DC: Well, Your Honor, certainly, that is, obviously a traumatic crime. Rape occurred in his family history. We believe, in addition to that, that he was hesitant in manner,

and his answers to, particularly, the elements questions, were troubling, due to his hesitation. And, of course, Your Honor, again, as the court mentions, he has a specific family history of a rape and murder.

MJ: Okay. Trial Counsel?

TC: Sir, with respect to the individual he knew, who was raped and murdered, it wasn't a family member at the time. He really didn't know her; it was right when him and his wife started dating. This was several years ago. He made absolutely no indication that this--that incident's going to affect him in anyway in judging the evidence in this case. And, to be quite honest, the only thing defense counsel mentioned, the first time, was that he was hesitant in his answers.

Getting to that point, again, the fact that he was hesitant in his answers doesn't mean anything. It was quite confusing. Actually, the military judge had to step in and explain some of the questions that were being asked to the Senior

Chief. The fact that he hesitated a second, again, can mean he was gathering his thoughts, in answering the question. There's nothing at all, given from his answers, that could, even if you're reading between the lines, that would suggest that he's going to be anything but fair and impartial in this case.

MJ: Okay. I understand. Any other challenges by the defense?

DC: No other challenges for cause, Your Honor.

MJ: Okay. Your challenges for all three are denied. Individually, Lieutenant McGee, I understand she--she did say she had worked for SAVI and Family Advocacy, but I found her answers to be honest, and she seemed very forthright in her answers, as far as not considering that when determining the facts of this case. I believe she can be a--a fair--I don't believe she has any actual or implied bias.

Regarding Senior Chief Lasher and Senior Chief Dean, I did

find that, from viewing both, I did not notice any--if there was any--any hesitancy in answering any of the questions, I did not take that as--I did not see in them that any--where that was meant that they were reluctant to follow the law or reluctant to answer questions. Simply, I took it as them considering--thinking about the question that was given and answering the question as honestly as they can. I found their demeanor to be appropriate.

Regarding Senior Chief Lasher and his billet as—so--frankly, I found their test--as far as the way they answered questions, did not give me any pause at all.

The other two issues, then, were regarding Senior Chief Lasher and his--his duties as a Chief Master-at-Arms. Because of the fact that--that's denied. He said he--indicated that he would view the evidence as--as presented to him, and he would not give any law enforcement agent any additional credibility. I also considered the fact that he never, personally,

> investigated any sexual assault type charges.
>
> And, regarding Senior Chief Dean, I found that--I've found no actual bias. I was, frankly a little concerned about the two rapes. But, I find they were--they happened so long ago, and not to a current family member. His ex-wife indicated--his one ex-wife indicated she was raped when she was younger. Did not seem to--Senior Chief Dean did not seem to be--have any difficulty with that, in his statements. And, his answers to questions seemed forthright. And, the fact that his ex-wife's sister was raped and murdered in 1980, he did not know her very well, if at all. He's no longer married to her. He wasn't married to his ex-wife at the time, and did not--he did not know the girl very well at all. So, I considered that, also. And, for those reasons, the challenges for cause are denied.

Record at 364-70.

We turn then to whether the military judge correctly denied the defense's challenges for cause against LT

McGee, Senior Chief Lasher, and Senior Chief Dean. Our review of the voir dire of these members suggests that the only possible basis for causal challenge here is R.C.M. 912(f)(1)(N), which provides that "[a] member shall be excused for cause whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality. R.C.M. 912(f)(1)(N). Our superior court has outlined the law applicable to such situations and the appropriate application of this rule.

> R.C.M. 912(f)(1)(N) encompasses "both actual bias and implied bias." R.C.M. 912(f)(3) provides: "The burden of establishing that grounds for a challenge exist is upon the party making the challenge." Military judges should be "liberal in granting challenges for cause."
>
> "The test for actual bias [in each case] is whether any bias 'is such that it will not yield to the evidence presented and the judge's instructions.'" "Actual bias is reviewed" subjectively, "through the eyes of the military judge or the court members."
>
> Actual bias is a question of fact. Accordingly, the military judge is

> given great deference on issues of actual bias, recognizing that he or she "has observed the demeanor of the" challenged party. "We will not overturn the military judge's" denial of a challenge unless there is "a clear abuse of discretion in applying the liberal-grant mandate."
>
> On the other hand, implied bias is "viewed through the eyes of the public." "The focus 'is on the perception or appearance of fairness of the military justice system.'" There is implied bias "when 'most people in the same position would be prejudiced.'" We give the military judge less deference on questions of implied bias. On the other hand, we recognize that, when there is no actual bias, "implied bias should be invoked rarely."

United States v. Warden, 51 M.J. 78, 81-82 (C.A.A.F. 1999)(citations omitted)(alteration in original); *see also United States v. Wiesen*, 56 M.J. 172 (C.A.A.F. 2001).

We must first determine whether the challenge is based upon actual or implied bias. Actual bias is a credibility issue and great deference is given to the determination of the military judge. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). "The test for actual bias is

whether any bias 'is such that it will not yield to the evidence presented and the judge's instructions.'" *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)(quoting *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)). Implied bias, however, is viewed objectively, through the eyes of the public. *Id.* The focus is on the appearance of fairness. *Id.* Given the responses of LT McGee, Senior Chief Lasher, and Senior Chief Dean during voir dire, we see no issue of actual bias in this case. We will therefore apply the more demanding objective standard concerning implied bias. We recognize that "[t]he burden of establishing that grounds for a challenge exist is upon the party making the challenge." R.C.M. 912(f)(3).

In applying the more demanding standard--affording the military judge less deference than we would in a case of actual bias--we have reviewed the findings of the military judge and adopt them as our own. We conclude that the military judge did not err in denying the appellant's causal challenges against LT McGee, Senior Chief Lasher, or Senior Chief Dean. We reach this conclusion primarily upon our own review of the voir dire of these three members, and arrive at the same findings as the trial judge. Record at pages 369-70. Accordingly, we reject the appellant's fourth through sixth AOE's.

Instructions – Character for Truthfulness

In the appellant's ninth AOE, he alleges that the military judge erred when he refused to give a defense-requested

instruction that the appellant's character for truthfulness could, in and of itself, give rise to reasonable doubt. Having evaluated this argument in the context of the evidence presented, as well as the appellant's alleged crimes, we conclude that the military judge did not err in refusing to give the requested instruction.

During the appellant's case-in-chief the defense presented the testimony of at least five witnesses who testified that the appellant was a truthful person. The appellant also presented evidence that the victim was not truthful. Based upon the evidence of his truthfulness, the appellant requested that standard instruction 7-8-1 from the Military Judge's Bench Book, Dept. of the Army Pamphlet 27-9 (Ch. 1, 30 Jan 1998), be given to the members. Specifically, the appellant focused on that portion of the instruction that said, "to show the probability of his innocence, the defense has produced evidence of the accused's character for truthfulness. Evidence of the accused's character for truthfulness may be sufficient to cause a reasonable doubt as to his guilt." Record at 778. The military judge refused to give that instruction. He explained his decision.

> MJ: Okay. I understand. Here's why I'm not giving that instruction. I believe that instruction goes towards--as a--when the character is an issue as a defense. For instance, good military character as a defense to--that the accused committed the crime; honesty as a defense that the

> accused may have stolen something; peacefulness, . . . as to whether the accused assaulted somebody; and--and truthfulness, as to whether he, possibly on a false official statement-type of charge. So, I believe that goes to--to a defense, as opposed to what the purpose that the evidence came in, and that was to show that the accused was credible and believable, and that he should be believed under oath, in either, his testimony in court or his prior statement to the NCIS, would be believed under oath.

Id. at 779.

Rather than giving the defense-requested instruction, the military judge gave the following instruction concerning evidence of the appellant's truthfulness. "Now, evidence has been received as to the accused's good character for truthfulness. You may consider this evidence in determining the accused's believability." *Id.* at 833. He immediately followed that with an instruction concerning the victim's credibility. "Evidence has been received as to [the victim's] bad character for truthfulness. You may consider this evidence in determining her believability." *Id.*

A military judge is required to give the court-martial

members "appropriate instructions" on findings. R.C.M. 920(a). This court examines a military judge's refusal to give a defense-requested instruction under a clear abuse of discretion standard. *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996)(citing *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993)). When determining whether a military judge properly exercised discretion in refusing to give a defense-requested instruction, we "examine the instructions as a whole to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence." *Maxwell*, 45 M.J. at 424 (quoting *United States v. Snow*, 82 F.3d 935, 938-39 (10th Cir. 1996). The question of whether a court-martial was properly instructed is a question of law, which we review *de novo*. *Id.* This court's standard for the adequacy of instructions is "whether the instructions as a whole provide meaningful legal principles for the court-martial's consideration." *United States v. Peszynski*, 40 M.J. 874, 882 (N.M.C.M.R. 1994)(citing *United States v. Truman*, 42 C.M.R. 106, 109 (C.M.A. 1970)). Finally, our superior court has held that a military judge's denial of a defense-requested instruction is error where: "(1) the requested instruction is correct; (2) 'it is not substantially covered in the main charge; and (3) it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation.'" *United States v. Poole*, 47 M.J. 17, 19 (C.A.A.F. 1997)(quoting *Damatta-Olivera*, 37 M.J. at 478).

We recognize the general principle, as did the trial

judge, that character evidence alone may be sufficient to give rise to reasonable doubt. *See United States v. Court*, 24 M.J. 11 (C.M.A. 1987). We, however, hold that there was no instructional error in this case for three reasons. First the requested instruction was not legally correct. "[I]n legal principle, character evidence as to truthfulness -- unlike other types of character evidence -- does not bear *directly* on guilt or innocence unless it is, in a particular case, a 'pertinent trait', say, in a prosecution for false official statement." *United States v. Yarborough*, 18 M.J. 452, 457 (C.M.A. 1984)(emphasis in original)(citations omitted). Here, the evidence of the appellant's truthfulness was clearly offered to bolster his credibility, and not as a pertinent character trait under MILITARY RULE OF EVIDENCE 404(a)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). Second, the issue of the appellant's credibility was adequately covered in the instructions given by the military judge, and was directly juxtaposed to instructions concerning the evidence of the victim's bad character for truthfulness. Finally, the instructions did not deprive or impair appellant's ability to effectively argue the credibility issues to the members. Thus, the military judge did not abuse his discretion when he did not give the defense-requested instruction.

Pretrial Issues

In AOE XII the appellant argues that the findings and sentence should be set aside because the charges had been originally referred to a special court-martial, and because the record does not contain an explanation of

why the charges were withdrawn and re-referred to a general court-martial. In AOE XIII the appellant asserts that the charges against him were not properly referred to trial. He alleges that there is a fatal jurisdictional flaw in the referral of the charges against him because the charges he actually faced at this court-martial were re-preferred after the conclusion of the Article 32, UCMJ, investigation. In AOE XIV the appellant alleges that the Article 32, UCMJ, investigation was fatally defective, primarily because numerous civilian witnesses did not testify at the investigation. These three assignments of error were submitted pursuant to *Grostefon*. Appellant's Brief at 38-45. We have examined the appellant's claims, and find no basis upon which to grant relief.

With respect to AOE XII, we apply waiver. The appellant did not raise this issue at trial where it could have been easily resolved. *See generally United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999)(holding that such issues are waived if not raised at trial). Since there is no requirement that the convening authority document his decision in any particular form, *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001), if the appellant had raised the issue at trial an oral explanation of the withdrawal and re-referral could have been provided in the record of trial. *Id.*

With respect to AOEs XIII and XIV, we initially note that we have previously considered the substance of these issues and resolved them against the appellant in *Diaz v. United States*, 54 M.J. 880 (N.M.Ct.Crim.App. 2000). Although that case was brought by the appellant

seeking an extraordinary writ, in which our standard of review is decidedly different than it is now, we rejected the substance of the appellant's argument in that decision. For the same reasons we relied upon in that decision, we conclude that the military judge did not abuse his discretion in denying the appellant's request for a new Article 32, UCMJ, investigation. *Id.* at 883. Furthermore, Article 32(e), UCMJ, specifically states that the failure to follow the requirements of Article 32, UCMJ, "does not constitute jurisdictional error." *See Frage v. Moriarty*, 27 M.J. 341, 343 (C.M.A. 1988). We conclude that the appellant's substantial rights were not materially prejudiced by the manner in which the appellant's Article 32, UCMJ, investigation was conducted, the manner in which the charges upon which he stood trial were preferred and referred to court-martial, or by the military judge's denial of the appellant's request for a new Article 32, UCMJ, investigation.

Testimonial Evidence

The appellant has raised three separate AOEs in which he alleges that the military judge erred by his decisions to either admit or exclude evidence. With respect to these AOEs, the same standard of review applies. A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003)(citing *United States v. McElhaney*, 54 M.J. 120, 132 (C.A.A.F. 2000)). "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is

incorrect about the applicable law, or when he improperly applies the law." *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004). We conclude that the military judge did not abuse his discretion in any of these three issues raised by the appellant. Furthermore, even if the military judge's rulings in each of these three instances were incorrect, there is no showing that the error materially prejudiced a substantial right of the appellant. *United States v. Reist*, 50 M.J. 108, 110 (C.A.A.F. 1999)(citing Art. 59(a), UCMJ). We, therefore, decline to grant relief.

A. Expert Witness.

In AOE VII the appellant contends that the military judge erred in allowing the Government to present the expert testimony of Dr. Kahn. The appellant asserts that the Government called this witness to try to repair damage to its case when the victim's mother testified that medical records showed that the victim had engaged in sexual intercourse. Appellant's Brief at 26-27. The appellant now argues that the military judge erred in admitting the expert testimony of Dr. Kahn because the "testimony could not, in any way, help the members understand the medical evidence (as there was none) or determine any fact in issue and could only serve to confuse them with respect to the significance of inconclusive evidence." *Id.* at 28. The appellant also attacks the credentials of Dr. Kahn as an expert witness. Appellant's Supplemental Reply Brief at 3-4.

We find no abuse of discretion, nor do we find

prejudice. First, we note that the military judge admitted the evidence because the appellant raised the issue during his cross-examination of the victim's mother. Record at 528. Second, we reject the appellant's premise that the testimony was not helpful. In fact, we find that it was helpful in this case. The absence of physical findings of sexual abuse in a medical evaluation of a potential victim of child sexual abuse or rape could easily lead to the conclusion that no abuse occurred. Dr. Kahn was able to explain to the members that the absence of physical findings in such examinations is not inconsistent with sexual abuse or rape of a child. Thus, the absence of physical findings does not necessarily mean that the abuse or rape did not occur. Third, while the military judge may have had misgivings about the helpfulness of Dr. Kahn's testimony, in retrospect, we find that it was highly helpful. Thus, the testimony was admissible. *United States v. Meeks*, 35 M.J. 64, 68 (C.M.A. 1992). Finally, we find that Dr. Kahn was adequately qualified to render an opinion as an expert in "child sex assault." Record at 530-39.

B. Impeachment.

In AOE VIII the appellant alleges that the military judge erred when he refused to allow the appellant to impeach the victim's sister with a prior inconsistent statement. The appellant called the victim's sister as a witness. During that testimony the following exchange occurred:

> Q. [B]ased on your opinion as [the victim's] sister, living in the same

house with her your whole life, do you believe [she] is a truthful person?

A. At times. But--she wouldn't lie about something like this, but we all do tell little white lies, at times, but in this case---

Q. Do you remember--I'm sorry, go ahead.

A. But, in this case, I don't think she would lie.

Q. Do you remember when I talked to you, way back when, when I came to your house---

MJ: Okay, Where you going with this?

DC: Well, she said [the victim] has a tendency to lie, then, sir. I'm trying to establish that.

MJ: I'm not going to go in to that.

DC: Well, sir, she's made an untrue statement. The jury's entitled to know. She said that [the victim] has a tendency to lie.

> ATC: Your Honor, if we're going to argue that objection, please, can we excuse the members?
>
> MJ: Yes. Members?
>
> BAILIFF: All rise.
>
> [All persons did as directed and the members withdrew from the courtroom.]

Record at 653-54. Thereafter the military judge explained his ruling to the defense counsel. In essence, he ruled that the appellant could ask the witness her opinion as to the victim's character for truthfulness, but he could not impeach the witness because she may have said the victim had a tendency to lie. The military judge explained that stating that someone had a tendency to lie is not the same thing as one's opinion as to truthfulness. *Id.* at 656. The military judge ruled that the appellant could ask the witness if she believed the "[victim] is an untruthful person." *Id.* at 659. The appellant did not ask the question. The appellant now asserts that this exchange prevented him from impeaching the witness with a prior inconsistent statement.

We conclude that the military judge did not abuse his discretion in this ruling. Not only do we review a military judge's decision to exclude evidence for an abuse of discretion, but a "military judge has

considerable discretion to determine if trial testimony is inconsistent with earlier assertions and to determine both admissibility and use of prior statements." *Damatta-Olivera*, 37 M.J. at 478. Here when the witness was asked if she believed that the victim was truthful, her immediate response was not "yes," but rather, "at times." Record at 653. The military judge concluded that the witness' earlier statement that the victim had a tendency to lie was not inconsistent with the witness' testimony. We concur.

In AOE XVIII, submitted pursuant to *Grostefon*, the appellant makes the same argument with respect to Naval Criminal Investigative Service (NCIS) Special Agent (SA) Degnan. He argues that he was prevented from impeaching SA Degnan with a prior inconsistent statement. In this instance, the Government called SA Degnan. During cross-examination he testified that the only evidence against Chief Diaz as to the rape specification was the word of the victim. *Id.* at 601. Appellant's counsel sought to press the point, asking, "[t]here's no physical evidence in this case, correct?" SA Degnan responded that he did not know if there was medical evidence because he was not a medical officer. *Id.*

The defense counsel then attempted to impeach SA Degnan with his prior inconsistent testimony at the Article 32, UCMJ, investigation in which he answered "no" to an almost identical question. *Id.* at 602. The government objected, and the military judge ruled in an Article 39(a), UCMJ, session, "I'm not going to even let

you go into prior inconsistent statements regarding the--regarding the medical evidence. He's already testified that he's not a doctor, and you already have out that the medical evidence showed nothing." *Id.* at 604. We note, however, that the defense counsel actually used the same prior inconsistent statement to impeach the witness over exactly the same issue only moments before. *Id.* at 600-01. Given the context in which this exchange between the defense counsel and SA Degnan occurred, we find no abuse of discretion.

Furthermore, even if the military judge erred when he denied the appellant the opportunity to impeach the victim's sister and SA Degnan through the use of prior inconsistent statements, the error did not result in material prejudice to the appellant's substantial rights. *Reist*, 50 M.J. at 110 (citing Art. 59(a), UCMJ). With respect to the victim's sister, she testified that the victim was truthful at times. Other witnesses testified as to the victim's poor character for truthfulness, and during instructions on findings the military judge highlighted that fact to the members. With respect to SA Degnan, as noted above, he was impeached by his prior statement.

C. Defense Requested Witnesses.

In AOE III, the appellant alleges that the military judge erred when he allowed the Government to select which defense-requested witnesses it would produce at Government expense. Prior to trial, the appellant sought the production of nine witnesses to testify as to the appellant's good military character. Appellate Exhibit

XXVII. When the Government denied those witnesses the appellant raised the issue before the military judge. The military judge, having determined that the appellant could introduce evidence of good military character, asked the defense to prioritize the requested witnesses. The defense provided the following prioritization: 1. CWO4 Horton; 2. LT Hernandez; 3. CDR McGettigan; 4. CWO DeBold; 5. LT Miller; 6. Mr. Lamb; 7. YN1 Torres-Leon; 8. Mr. Zins; and 9. CAPT Spicer. Record at 133-34. The military judge then ruled as follows:

> Here's what I'm going to do. I'm going to order the production of four of the witnesses. And, what I'll do is, I will permit the government to make—deny one of the four, based purely on the expense. In other words, if the government says we don't want to bring in the witness from Yokosuka, because it will cost a lot of money, I'll permit you to make that one, based purely upon—after that, I would ask you to go down—and I'm not saying you should deny Lieutenant Hernandez, but I would ask you to go down the—go down, by the defense's preference, and I will, however, permit, if there is a[n] operational requirement as to why a witness—an operational—sometimes it's not even operational,

> it's a personal--a witness has a--his wife is sick, or expecting a baby or something, I'll permit you to go on to the next one, if you have a good basis for that. I'm going to give the government one, probably the [inaudible]--or just because it's a long way for the witness to come and for the expense. Frankly, defense, I gave you--I weighed it and rather than--I kind of gave the--I've given to the government, in my mind, I believe I've given you an extra one, to make up for them being able to choose. So you can approve three and give the other ones--let you deal with the other one however you want. But, I'm giving the government a little something, because I am giving you something in return.

Record at 134-35. The appellant did not object to this ruling. Additionally, the appellant did not offer evidence of good military character on the merits. During sentencing, the appellant presented the testimonies of Mr. Horton, CDR McGettigan, LT Miller, and Mr. Zins, and affidavits from LT Hernandez, CWO2 DeBold, Chief Lamb, and CAPT Spicer.

Without question, the ruling of the military judge lacks clarity. We are not exactly sure what the ruling means.

It seems, however, that he told the Government to produce four witnesses, that the Government could deny one witness of the four proposed by the appellant, but four witnesses would be produced. We conclude that the issue was waived by the appellant's failure to object to the procedure. *See generally United States v. Ruth*, 46 M.J. 1, 2 (C.A.A.F. 1997). Furthermore, since the appellant did not introduce evidence of good military character on the merits, we discern no material prejudice to the appellant's substantial rights that flowed from the military judge's ruling. *Reist*, 50 M.J. at 110 (citing Art. 59(a), UCMJ).

Speedy Review

In the appellant's tenth AOE, he asserts that he has been denied his statutory and constitutional right to a speedy review of his case. As relief he requests that the findings and sentence be set aside, or that he be granted two days sentencing credit for every one day he served in post-trial confinement between 1 December 2000 and 5 August 2003. We decline to grant relief.

We are cognizant of this court's power under Article 66(c), UCMJ, to grant relief for excessive post-trial delay even in the absence of actual prejudice. *See United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). We are also cognizant of the post-trial timeline of this case and the holding of our superior court in *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34 (C.A.A.F. 2003). We have fully complied with the Decision and Order in that case. *Id.* at 40.

While we do not condone the post-trial delay in this case, we do not find that the delay affected the "findings and sentence [that] 'should be approved,' based on all the facts and circumstances reflected in the record . . . ." *Tardif*, 57 M.J. at 224. In deciding that this case is not one in which relief should be granted as a result of post-trial delay, we have considered the fact that in our detailed review of the appellant's record of trial and upon consideration of all of the post-trial pleadings, we have found no errors that materially prejudiced any of the appellant's substantial rights. The appellant would be granted a windfall were we to afford him relief simply because of the period of time it took to review the lengthy record of trial and consider the appellant's numerous appellate issues.

Conclusion

We have considered the remaining assignments of error and concluded they are without merit. Accordingly, we affirm the findings and sentence as approved by the convening authority.

Judge SCOVEL and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix I

UNITED STATES, Appellee

v.

Leonard Y. DURAN Hull Maintenance Technician Second Class (E-5), U.S. Navy, Appellant

No. 06-0408/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200000781

October 18, 2006, Ordered

Counsel for Appellant: LT Richard H. McWilliams, JAGC, USNR.

Counsel for Appellee: LT Craig A. Poulson, JAGC, USNR.

On consideration of the petition for granted of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, and in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, we conclude that any error in that regard was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 18th day of October, 2006,

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

Appendix J

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER D.A. WAGNER R.W. REDCLIFF

UNITED STATES

v.

Leonard Y. DURAN
Hull Maintenance Technician Second Class (E-5),
U.S. Navy

NMCCA 200000781 Decided 22 June 2005

Sentence adjudged 6 January 2000. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silverdale, WA.

LT ROBERT SALYER, JAGC, USNR, Appellate Defense Counsel.

JOSEPH W. KASTL, Civilian Appellate Counsel.

LT R.S. SNYDER, JAGC, USNR, Appellate Defense Counsel.
LT STEVE CRASS, JAGC, USNR, Appellate Government Counsel
LT C.J. GRAMICCIONI, JAGC, USNR, Appellate Government Counsel

REDCLIFF, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of indecent acts and liberties with a child, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge sentenced the appellant to a dishonorable discharge, confinement for 3 years, and reduction to pay grade E-1, recommending that the convening authority suspend all confinement in excess of 27 months contingent upon the appellant's successful treatment as a sexual offender. The military judge also recommended that the convening authority defer and waive automatic forfeitures. The convening authority approved the sentence as adjudged. There was no pretrial agreement.

We have carefully considered the record of trial, the appellant's assignments of error contending that the evidence is legally and factually insufficient, and that he was denied effective assistance of counsel (submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)). We have also considered the Government's response. We conclude that the findings

and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Sufficiency of Evidence -- Indecent Acts

In his first assignment of error, the appellant contends that the Government failed to prove beyond a reasonable doubt that he committed indecent acts upon "KK" because her testimony was unreliable and uncorroborated. The appellant avers that this court should disapprove the findings of guilty to the Charge and its sole specification. We decline to do so.

The appellant was charged with and found guilty of indecent acts and liberties with a child on one occasion in April 1999. The evidence of indecent acts consists of KK's trial testimony that she knew the appellant because his wife provided care to KK's ailing grandmother. KK stated that she occasionally went to the appellant's home to play with his 2-year old grandson. It was on one such visit that the indecent acts occurred when KK slept at the appellant's residence. KK testified that she took a shower and then went to bed after watching television. As she slept, the appellant entered the bedroom and put her hand on his erect penis. KK pretended to be asleep and pulled her hand away. Record at 162. The appellant again placed her hand on his penis, and KK rolled onto her side. The appellant then pushed KK over and rubbed outside and inside her "private" area. He then "poked" her vagina with his finger. *Id.* at 163-64. She heard a "bang" and the appellant left the room, returning 5-10

seconds later to ask her "what's wrong." *Id. at 166.* At the time of the incident, KK was age 9 and not married to the appellant.

KK further testified that she did not yell when the appellant touched her or report his misconduct immediately thereafter because she was afraid of the appellant. Record at 167. On the day following the incident, however, KK went to church with the appellant and played basketball with him. *Id.* at 169. She explained her continued contact with the appellant, stating that she felt "stuck" at the appellant's home. *Id.* at 167. Later, the appellant invited her to return the following weekend, but she "made up excuses" not to do so. KK further testified that she was afraid that the appellant "would do something even worse to [her]." *Id.* at 170.

Afterwards, KK confided in her girlfriend as to what had happened at the appellant's home, and her girlfriend told KK that she would tell her parents if KK did not. KK then told her older brother (and later, her school guidance counselor) what had occurred with the appellant. Record at 172.

To support its case, the Government also called Special Agent "M" from the Naval Criminal Investigative Service (NCIS). Special Agent M testified that he observed KK's interview with local child protective service (CPS) personnel and subsequently set up, and recorded, a phone conversation between KK and the appellant. Although the appellant did not admit

culpability during the phone conversation, the appellant did ask KK if she had already told her mom what had happened. He also suggested that KK only talk about it in front of him and his wife. *Id.* at 215, 241.

Mrs. "AK", the victim's step-mother, testified that KK's older brother told her that she needed to speak to KK but didn't indicate why. Initially, KK did not want to talk to Mrs. AK but then told her what had happened. KK appeared "very upset" as she related the incident. Record at 223-24. However, Mrs. AK conceded that KK had lied in the past and had continued lying to cover up her lie. *Id.* at 229.

The defense vigorously cross-examined KK and sought to discredit her by highlighting inconsistencies in her testimony concerning details of the incident. These inconsistencies included KK's initial statement to CPS in which vaginal penetration is not discussed, as well as how the appellant and KK were clothed and positioned at the time of the incident.

The defense also presented evidence on the merits by calling the appellant's wife, "Mrs. SD," who testified that she had been employed by KK's family until the alleged incident. She testified that she is a light sleeper and knows when the appellant gets up and gets back into their bed. On the night of the incident, Mrs. SD testified that the appellant never left their bed. Record at 251-52. On the next day, she testified that everyone got up at about 8 a.m. and went to church. Mrs. SD didn't notice anything unusual about KK. *Id.* at 256-58. She also

testified that KK disliked the appellant because he disapproved of KK's brother and her brother's friends. *Id.* at 263, 275-6.

The appellant took the stand in his own defense and testified that the alleged incident never happened. The appellant further testified that he occasionally disciplined KK and her brother when they gave his wife (Mrs. SD) a hard time. Record at 300. He described KK as "hard-headed" and manipulative. He also described a confrontation he had with KK's brother's friends because he heard them talking about drugs.

In recounting the events on the night of the alleged incident, the appellant stated that KK went to bed first. He asserted that he never got out of bed that evening after KK went to sleep. Record 304. The next morning, he noticed no change in KK's personality, and they spent the day playing basketball, as they had done many times before. *Id.* at 305.

The appellant next explained his phone conversation with KK that was recorded by NCIS. He testified that he had been working the night before the call and was tired. He further testified that he was both "surprised" and "concerned" when he received the call. He explained that he wanted to talk to KK about the allegations with her parents and his wife present. Record at 311-12. He adamantly denied touching KK inappropriately, "[a]s God as my witness." *Id.* at 312. Finally, the appellant admitted he had received nonjudicial punishment for fraud, explaining that he

didn't know his divorce was final while he continued to receive housing allowances. On cross-examination, the appellant also admitted that he previously had money problems and had written checks that bounced.

The elements of the appellant's offense are as follows:

> (1) That the accused committed a certain act upon or with the body of a certain person;
>
> (2) That the person was under 16 years of age and not the spouse of the accused;
>
> (3) That the act of the accused was indecent;
>
> (4) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, victim, or both; and,
>
> (5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 87b(1).

We begin by noting that "[t]he test for factual

sufficiency 'is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,' [this] court 'is convinced of the [appellant's] guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)(quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)); *see* Art. 66(c), UCMJ. Reasonable doubt does not require that the evidence presented be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). Further, this court may believe one part of a witness' testimony and disbelieve other aspects of his or her testimony. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). Our task here is to determine whether KK's testimony and its corroborating evidence were sufficient to convict the appellant.

We have carefully considered the evidence presented at trial, keeping in mind that the fact-finder saw and heard all the witnesses. Art. 66(c), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The appellant's allegations regarding KK's credibility and possible motive to fabricate were fully developed at trial and ably argued before the trial court. After careful review of the record, we find that KK's testimony was credible and partially corroborated by the other evidence adduced at trial. We further find that the appellant's acts were both prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces. We have no difficulty concluding that a reasonable fact-finder could find the appellant guilty of indecent acts and liberties with a child. We conclude that the evidence presented was both legally and factually

sufficient to sustain the appellant's conviction. We are also convinced beyond a reasonable doubt of the appellant's guilt. We, therefore, decline to grant the requested relief.

Effective Assistance of Counsel

The appellant also asserts that he was denied the effective assistance of counsel because his trial defense team was deficient in several aspects of their investigation and trial strategy.[1] We find no deficient performance by counsel.

The U.S. Supreme Court has articulated two prongs that an appellate court must find before concluding that relief is required for ineffective assistance of counsel --

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[1] The appellant cites 24 areas of concern regarding the performance of his trial defense counsel team and raises "20 Disturbing Questions" in a 27-page affidavit dated 21 Feb 2001. In this affidavit, the appellant alludes to his defense team's inexperience, purported lack of a trial strategy or "solid trial plan," no real investigation," his inadequate preparation for cross-examination, their imprudent forum election advice, and other performance shortfalls. As discussed further above, we find no merit in these complaints.

deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The proper standard for attorney performance is that of reasonably effective assistance. *Id.* Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* This Constitutional standard applies equally to military cases. *See United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987). The Strickland two-part test applies to guilty pleas and sentencing hearings that may have been undermined by ineffective assistance of counsel. *See United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000)(citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)). In order to show ineffective assistance, however, an appellant must surmount a very high hurdle. *See United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997). Here, the appellant falls short of the mark.

Trial defense counsel have a duty to perform a reasonable investigation or make a determination that an avenue of investigation is unnecessary. *See United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002); *United States v. Brownfield*, 52 M.J. 40, 42 (C.A.A.F. 1999). We do not look at the success of a trial theory, but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time. *See United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001).

Here, the appellant's assertions of ineffective assistance of counsel constitute nothing more than bare allegations

concerning counsels' perceived omissions, supported only by his own self-serving affidavit. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). We will not presume that counsel did not investigate or research potential avenues of defense, particularly where the appellant indicated his satisfaction with counsel several times during the proceedings. As to the issue of forum election, the appellant himself chose trial by military judge alone after being appropriately informed of his forum election rights by the military judge. As to the issue of lack of trial plan, it is abundantly clear from the record that the trial defense team aggressively pursued a strategy designed to discredit the Government's complaining witness and undermine her accusations of abuse. As to the decision to call or not call certain witnesses, those decisions are tactical decisions within the professional judgment of the counsel that we will not "second guess" absent compelling circumstances. As to the issue of preparation of the appellant for cross-examination, the appellant's testimony was clear and ably presented. That he did not have "all the answers" to hard questions posed by the Government counsel is more likely a product of the crucible of cross-examination rather than inadequate preparation by his own counsel. Finally, we note that the appellant's trial defense team presented a strong case on the merits, especially in challenging the Government's evidence and in obtaining a judicial view of the crime scene to place the evidence in proper context, as well as in providing significant extenuation and mitigation evidence, resulting in a sentence to confinement considerably less than the statutory maximum punishment.

Simply put, we find that the appellant's numerous contentions of ineffective assistance of counsel are nothing more than "buyer's remorse" arising from his subsequent conviction and punishment rather than deficiencies of criminal defense representation. Thus, we hold that the appellant has not met his burden in demonstrating ineffective assistance of counsel and decline to grant relief on this basis.

Conclusion

Accordingly, the findings and sentence, as approved by the convening authority, are affirmed.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix K

UNITED STATES, Appellee

v.

Christopher B. DURFEE, Builder Second Class (E-5), U.S. Navy, Appellant

No. 06-0109/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 9901453

September 11, 2006, Ordered

Counsel for Appellant: LT. Richard H. McWilliams, JAGC, USNR.

Counsel for Appellee: LT Mark H. Herrington, JAGC, USNR.

On consideration of the granted issue, in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. On consideration of the specified issue, the United States

Navy-Marine Corps Court of Criminal Appeals erred in affirming "two-thirds pay per month for any period of remaining active service after the date of trial." See Rule for Courts-Martial 1003(b)(2). However, because Appellant did not receive any adjudged confinement and was on appellate leave in a no-pay status after trial, that error is harmless. We will remedy that error in our decretal paragraph. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed as to findings and only so much of the sentence as includes a bad-conduct discharge and reduction to E-1. The remainder of the sentence is set aside and dismissed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in United States v. Moreno, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and United States v. Allison, 63 M.J. 365, 371

(C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix L

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER W.L. RITTER J.F. FELTHAM

UNITED STATES

v.

Christopher B. DURFEE
Builder Second Class (E-5), U.S. Navy

NMCCA 9901453 Decided 15 September 2005

Sentence adjudged 8 July 1998. Military Judge: K.A. Krantz. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base, Jacksonville, FL.

LT M.J. NAVARRE, JAGC, USNR, Appellate Defense Counsel

LT J.R. GOODMAN, JAGC, USNR, Appellate Defense Counsel
LT CLARICE JULKA, JAGC, USNR, Appellate

Government Counsel

Capt GLEN HINES, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

RITTER, Senior Judge:

The appellant was tried by a general court-martial composed of officer and enlisted members. Contrary to his pleas, the appellant was convicted of forcible sodomy, assault, committing an indecent act, and receipt of obscene materials, in violation of Articles 125, 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925, 928 and 934. The members sentenced the appellant to total forfeitures, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the findings and sentence.

The appellant contends: (1) the charges of forcible sodomy, assault, and committing an indecent act constitute an unreasonable multiplication of charges; (2) the evidence is insufficient to sustain his convictions for forcible sodomy, assault and committing an indecent act against his ex-wife, and for receiving obscene material on his home computer; (3) the members were incorrectly instructed to apply a "local community standard" in determining the obscene nature of material received over the internet; and (4) even if the "local community standard" was proper, the members in the appellant's

case were not qualified to determine that standard for the Miami, Florida, area when appellant's court-martial convened in Jacksonville, Florida.

We have examined the record of trial, the appellant's brief and assignment of errors, his supplemental assignment of error, and the Government's answers to both pleadings. With the exceptions noted below, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Unreasonable Multiplication of Charges

In his first assignment of error the appellant asserts that Specification 1 of Charge III (forcible sodomy), Specification 1 of Charge IV (assault) and Specification 1 of Charge V (indecent act) represent an unreasonable multiplication of charges.[1] At trial the appellant made a motion to dismiss the above-listed specifications as multiplicious, arguing that the assault and indecent act were both lesser included offenses of the forcible sodomy offense. *See* Record at 67-72; Appellate Exhibit

[1] These offenses were originally numbered as Charge VI, Specification 2 (forcible sodomy), the sole specification under Additional Charge I (assault), and Charge VIII, Specification 1 (indecent act). After certain specifications were combined or dismissed on motion, the offenses were renumbered as they appear in Appellate Exhibit LXI.

XXI. On appeal, the appellant uses the doctrine of unreasonable multiplication of charges in arguing for the same remedy. We agree with the appellant's original contention at trial, and find the assault and indecent acts offenses to be multiplicious with the forcible sodomy offense.

1. Facts

The appellant's marriage with his wife of five months had become strained, and the appellant had begun talking about divorce. One evening, after the appellant had been using his computer, he came into the bedroom of their trailer home, where his wife, S, was lying face down on the bed, in her pajamas. The appellant went into the bathroom, got some kind of cream, and came over to the bed. S noticed he already had an erection.

The appellant straddled S, held her arms behind her back with his left hand, and rested his legs on top of hers. S tried to move, but could not. He pulled her pajamas off and rubbed the cream on her buttocks in the vicinity of her anus. He reached into her anus with two fingers, and S said "Stop, this hurts a lot." The appellant then took his fingers out and penetrated her anus with his penis. After a few minutes the appellant stopped, and S went into the bathroom to clean up. Showing her husband the blood on the towel she used to clean up, S said, "Chris, look at this; look what you did." The appellant replied, " If you were relaxed, that wouldn't have happened." Their relationship became more strained from that point on, and S left their home in Florida to return to her

parents' home in Puerto Rico six days later.

2. Analysis

Specifications are multiplicious for findings if each alleges the same offense, or if one offense is necessarily included in the other. RULE FOR COURTS-MARTIAL 907(b)(3)(B), MANUAL FOR COURTS-MARTIAL (1998 ed.), Discussion. "A specification may also be multiplicious with another if they describe substantially the same misconduct in two different ways." *Id.*

The elements of the offense of forcible sodomy are: (1) that the accused engage in unnatural carnal copulation with a certain other person; and (2) that the act was done by force and without the consent of the other person. The force element present in the sodomy charge requires both an overt act of force and the victim's lack of consent. Under the facts of this case, the appellant's act of straddling S and holding her arms back while forcibly inserting his penis clearly serves both as the overt act for forcible sodomy and as the basis for the assault charge. *See e.g. United States v. Britton*, 47 M.J. 195 (C.A.A.F. 1997). We have no difficulty concluding that the assault charge is a lesser included offense of the forcible sodomy charge, and is therefore multiplicious for findings.

The multiplicity issue regarding the appellant's conviction for committing an indecent act is less clear. Forcible sodomy and indecent acts are separate crimes, as they each require proof of an element not required to

prove the other. *See United States v. Frelix-Vann*, 55 M.J. 329, 331-32 (C.A.A.F. 2001); *United States v. Teters*, 37 M.J. 370, 377 (C.M.A. 1993). In this case, the two charges involve separate acts, in which the appellant employed different parts of his body. Had the facts of this case indicated that one of the appellant's goals in straddling his wife and holding her arms behind her back was to insert his fingers into S' anus, we would have no difficulty in affirming his convictions for both indecent act and forcible sodomy. *See United States v. Neblock*, 45 M.J. 191, 198 (C.A.A.F. 1996)(stating "`[I]f successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.'" (citation omitted)).

However, under the particular facts of this case, we are convinced that the appellant inserted his fingers into S' anus **only** to facilitate the insertion of his penis. S' testimony strongly suggests that the appellant inserted his fingers only long enough for her to react with a brief complaint before he proceeded to insert his penis. Record at 609. Since we are persuaded that the indecent act was only a means to another end -- sodomy -- we find that the appellant's insertion of his two fingers was part of the force used to commit forcible sodomy. As such, it is a lesser included offense of the latter offense, and must be set aside and dismissed.

Our holding moots the appellant's claim that the three charges and specifications constituted an unreasonable multiplication of charges. *See United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(*en*

banc), *aff'd*, 58 M.J 183 (C.A.A.F. 2002)(summary disposition). We will take remedial action in our decretal paragraph, below.

Sufficiency of Evidence

Forcible Sodomy

The appellant also challenges his conviction for forcible sodomy on the basis that his wife's testimony was unreliable, thus rendering the evidence factually and legally insufficient. We disagree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational fact finder could have found that all the necessary elements of the offense beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. However, reasonable doubt does not mean that the evidence must be free of conflict. *United States v. Reed*, 51 M.J. 229, 562 (N.M.Ct.Crim.App. 1997), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). A fact-finder may believe one part of a witness' testimony and disbelieve another. *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999).

Our task is to determine whether the testimony of the appellant's ex-wife alone was sufficient to convict the appellant. While the appellant's allegations regarding his ex-wife's credibility and possible prior inconsistent statements were developed at trial and ably argued to the court, our own review of the record convinces us that a rational fact-finder could find S' testimony credible. We therefore find the evidence legally sufficient as to the charge of forcible sodomy.

Moreover, we are convinced of the appellant's guilt on this charge beyond a reasonable doubt. S testified in graphic detail concerning the appellant's acts in forcibly sodomizing her. We are convinced from our review of the record that most of the discrepancies in S' testimony are attributable to the fact that she could not speak English. She had difficulty expressing herself at trial even though she testified through an interpreter. She stated she had similar difficulty being understood during the investigation of the appellant's offenses. Finally, we find her testimony more credible than the only evidence directly rebutting it. That came from Special Agent (SA) Washington of the Naval Criminal Investigative Service (NCIS), who testified that the appellant, in an unsworn oral statement, admitted to massaging his wife with skin cream on the external portion of her anus and to consensual sex on the night in question, but denied committing anal sodomy. We thus find the evidence both legally and factually sufficient to support the finding of guilt for committing forcible sodomy.

Receiving Obscene Materials

The appellant next contends that the evidence is legally and factually insufficient to support his conviction for receiving obscene materials. We disagree.

1. Facts

Shortly after he separated from S, the appellant began living with Ms. B. The difficulties in his relationship with Ms. B served as the basis for a number of charges of which the appellant was acquitted. These included a charge of rape that allegedly occurred on 1 June 1996. On 3 June 1996, at Ms. B's insistence, the appellant moved out of their apartment. When Ms. B returned to her home after a work-related interview, the appellant was still in the process of moving out. At that point, he had removed from the apartment and placed on either a truck or U-Haul trailer almost all of Ms. B's personal property. This property included six or seven computers, most of which Ms. B used for her personal computer business. After arguing with the appellant, Ms. B called the police and, at their direction, the appellant unloaded and returned some of the items, including electronic equipment for which he did not have a receipt. He returned his personal computer, and kept the others.

The next day, 4 June 1996, Ms. B called the NCIS and left a message, seeking their assistance to ensure the appellant left her alone. She then went to a state victim assistance office and applied for a restraining order

against the appellant. After returning home, she received a phone call from the appellant, in which he threatened to break her legs if she told anyone what was on his computer. Since the appellant had taken all of the computer monitors, power cords, keyboards, and associated equipment, Ms. B went out and purchased these items so as to examine the computer, in an effort to ascertain the reason for the appellant's threatening phone call.[2] Reviewing the computer's files, she found the photographs that were the basis for the charge of receiving obscene matters.

SA Washington met Ms. B at her apartment on 10 June 1996 to discuss her allegations of sexual assault. She took the opportunity to inform him that there were both adult and child pornographic images on the appellant's computer, and suggested he take it. SA Washington told Ms. B that he would not confiscate the computer that day, but would return to take her written statement and would retrieve the computer at that time. He returned and took custody of the computer on 21 June 1996.

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[2] Ms. B also testified to a secondary motive for examining the computer. She stated that the appellant had threatened to report her to Microsoft Corporation for pirating software. Since the appellant had taken all of her business records when he moved out, she also searched the computer in hopes of finding electronic proof of the purchase certificates for the software she used in her computer business. Record at 762.

2. Analysis

The appellant contends that since Ms. B was a trained computer technician and had sole access to the appellant's computer after he moved out of the apartment, she must have put the obscene material onto his computer. He also suggests that because he was found not guilty of all the other charges that involved Ms. B as a victim, her testimony is inherently unreliable and therefore, we should not affirm any conviction based on Ms. B's testimony. We disagree with both contentions.

The appellant was convicted under Article 134, UCMJ, of violating 18 U.S.C. § 1462. This section of the United States Code prohibits the importation, transportation or receipt of obscene matters. To sustain the appellant's conviction under this section, the Government must establish the following elements beyond a reasonable doubt:

> (1) That during the period 1 January 1994 to 21 June 1996, the appellant knowingly and unlawfully received from the mail or an interactive computer service, several visual depictions;
> (2) That the depictions portrayed defecation, homosexual sodomy and masochism[3]; and

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[3] The appellant was charged with receiving visual depictions of bestiality as well, but the members found him guilty of the specification after excepting the word

(3) That the depictions were obscene, lewd and lascivious.

18 U.S.C. § 1462; Record at 1040-41.

After carefully reviewing the record, we have no difficulty concluding that a rational factfinder could find the appellant guilty of this offense. Moreover, we are convinced beyond a reasonable doubt of the appellant's guilt, based on a combination of Ms. B's testimony and other evidence admitted at trial.

In unrebutted testimony, Ms. B stated that she first contacted the NCIS before she even examined the computer. She did so for essentially the same reason that she went to the state victim assistance office immediately after calling NCIS; that is, she was seeking help to keep the appellant away from her. Upon her return from the victim assistance office, she received a telephone call from the appellant, threatening to "break her legs" if she told anyone what was on the computer. Only then did she purchase the necessary computer equipment to review the files on the appellant's computer, and discovered the obscene matter.

Other evidence supports the appellant's conviction on this offense. Sergeant Reddish, a friend of the appellant, testified that the appellant had in the past provided him computer disks that contained adult pornographic images. The NCIS computer analysis expert, Ms.

"bestiality."

Fugere, testified that the obscene photographs that were the basis for the charged offense were contained on the computer's "c" drive, which also included material such as a Seabee emblem, designating the appellant's Naval community, and transcripts of chat room conversations in which he participated. Finally, we are cognizant of the fact that the members viewed the witnesses and, although they acquitted the appellant of numerous offenses relating to Ms. B, they found her testimony credible enough on this point to find him guilty of this offense beyond a reasonable doubt. We are convinced of the appellant's guilt by the same standard, and thus find the evidence both legally and factually sufficient as to this offense.

Standard for Determining Obscenity

The appellant contends that the military judge erred in instructing the members as to the proper standard for determining whether the materials found on the appellant's computer were obscene. Although he agreed at trial that a "local community standard" should be used, he now argues that the proper standard should have reflected the entire internet community. In a separate assignment of error, he contends that even if a local community standard was proper, the court-martial that was convened in Jacksonville, Florida, was not qualified to determine obscenity by the community standard for South Florida. We find that both arguments were waived at trial.

In *Miller v. California*, 413 U.S. 15, 24 (1973), the

United States Supreme Court established a three-step analysis for determining whether material may be deemed obscene:

(a) Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(b) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The propriety of instructions given by the military judge is reviewed *de novo*. *United States v. Simpson*, 56 M.J. 462, 465 (C.A.A.F. 2002); *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001). A failure to object to an instruction prior to commencement of deliberations waives the objection in the absence of plain error. R.C.M. 920(f); *see United States v. Grier*, 53 M.J. 30, 34 (C.A.A.F. 2000); *United States v. Cooper*, 51 M.J. 247, 252 (C.A.A.F. 1999). The burden is on the appellant to establish plain error. *Simpson*, 56 M.J. at 465. In order for there to be plain error, (1) there must be an error; (2) the error must be clear and obvious; and (3) the error must affect the substantial rights of the appellant. *Grier*, 53 M.J. at 34 (*citing United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998)). Military courts are further constrained by Article 59(a), UCMJ, in that they may reverse for legal error only if it "materially

prejudices the substantial rights of the accused." *See Powell*, 49 M.J. at 465. The waiver rule of R.C.M. 920(f) reflects a determination by the President that "an attorney may make tactical decisions at trial which, though they may have turned out to be unsuccessful, should not be second-guessed in appellate review." *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999).

The appellant, through counsel, requested that the members be instructed to use the community standards of South Florida to determine whether the photographs were obscene. While the case law is not firmly settled as to what community standard should be used, we are confident the local community standard used in this case is not inconsistent with the Supreme Court's guidance in *Miller v. California*. In any case, the appellant has not demonstrated that this instruction was in error. Although he now argues for an internet-wide community standard, some military and federal district courts that have considered this issue have rejected an "internet-wide" or "cyber-standard" as a specific community for determining community standards of obscenity. *See United States v. Gallo*, 53 M.J. 556, 568 (A.F.Ct.Crim.App. 2000); *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996). The appellant has failed to demonstrate clear error in the military judge's instruction. We thus find no plain error, and conclude that the issue was waived.

Likewise, the appellant did not argue at trial that the court-martial members were unqualified to apply the

South Florida local community standard. Nor has he demonstrated in his pleadings that they were in fact unqualified to implement the standard that he proposed they use. We thus find no clear error. In the absence of plain error, this issue was also waived. *See* R.C.M. 801(g).

Assuming *arguendo* these issues had not been waived and that error occured, we find no prejudice. The appellant has not articulated any prejudice, and having reviewed the photographs ourselves, this court cannot imagine any reasonable community standard by which they would not be deemed "obscene, lewd or lascivious" by the criteria set forth in *Miller v. California*. Accordingly any error was harmless.

Forfeiture of Pay

As a final matter, although it was not assigned as error, we note that the convening authority erred in approving the adjudged total forfeitures despite the fact that no confinement was adjudged. A service member cannot be required to forfeit more than two-thirds pay while on active duty and not serving confinement. *United States v. Warner*, 25 M.J. 64, 67 (C.M.A. 1987); *see also* R.C.M. 1107(d)(2), Discussion. The appellant has not contended, let alone demonstrated, that he was deprived of more than two-thirds pay for any period of time following his court-martial. However, we will eliminate any potential prejudice in our decretal paragraph.

Conclusion

Accordingly, the court sets aside and dismisses the findings of guilty under Specification 1 of Charge IV and Specification 1 of Charge V. In light of our finding that both of these specifications were multiplicious for findings with Specification 1 of Charge III, we have reassessed the sentence in accordance with *United States v. Cook*, 48 M.J. 434, 437-38 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426, 427-29 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Upon reassessment, the court finds the sentence, as modified to avoid excessive forfeitures, appropriate for the remaining offenses and this offender.

We therefore affirm the findings only as to Charge III, Specification 1, and Charge V, Specification 7, as approved by the convening authority, and only so much of the sentence as provides for reduction to pay grade E-1, forfeiture of two-thirds pay per month for any period of remaining active service after the date of trial, and a bad-conduct discharge.

Senior Judge CARVER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix M

UNITED STATES, Appellee

v.

Tyrone J. FORNEY, Machinist's Mate Second Class (E-5), U.S. Navy, Appellant

No. 04-0604/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200001573

September 11, 2006, Ordered

Counsel for Appellant: Captain James Valentine, USMC.

Counsel for Appellee: LTCol Raymond E. Beal, II, USMC.

On consideration of the specified issue, in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006), assuming that the Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt.

Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in United States v. Moreno, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix N

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

CHARLES Wm. DORMAN M.J. SUSZAN R.C. HARRIS

UNITED STATES

v.

Tyrone J. FORNEY

Machinist's Mate Second Class (E-5), U.S. Navy

NMCCA 200001573 Decided 12 November 2003

Sentence adjudged 21 April 2000. Military Judge: J.P. Winthrop. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Air Force, United States Atlantic Fleet, Norfolk, VA.

Capt PHILLIP D. SANCHEZ, USMC, Appellate Defense Counsel

LT C.C. BURRIS, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of rape of a child (two specifications), in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was sentenced to confinement for 16 years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the adjudged sentence and, pursuant to a pretrial agreement, suspended confinement in excess of 15 years for 20 years.

After carefully considering the record of trial, the appellant's three assignments of error, and the Government's response, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Sentencing Deliberations

In the appellant's first assignment of error, he contends that the military judge erred by deliberating for a mere seventy-two minutes despite receiving nine defense exhibits, consisting of 115 pages, two hours of

testimony from five witnesses and lengthy counsel argument, creating both actual unfairness and the appearance of unfairness in the court-martial. The appellant avers that this court should return his case to the convening authority for a rehearing on sentence or, in the alternative, approve only so much of the sentence as provides for confinement for seven to ten years, reduction to pay grade E-1, and a bad-conduct discharge. We disagree.

In the appellant's second assignment of error, he contends that the military judge erred by disregarding his excellent military character as evidence in mitigation. The appellant avers that this court should return his case to the convening authority for a rehearing on sentence or, in the alternative, approve only so much of the sentence as provides for confinement for seven to ten years, reduction to pay grade E-1, and a bad-conduct discharge. We disagree.

Neither the UCMJ nor the Manual for Courts-Martial requires the fact-finder to deliberate for any particular length of time, whether it is on findings or sentence. *United States v. Lentz*, 54 M.J. 818, 821 (N.M.Ct.Crim.App. 2001)(citing *United States v. Pena*, 11 M.J. 509, 510 (N.M.C.M.R. 1981)). Therefore, we presume that there is no actual unfairness or any appearance of unfairness in the appellant's case based on the length of time of deliberation. The military judge, who enjoys the presumption of knowing and properly applying the law, heard all of the evidence and argument of counsel before deliberating for seventy-two minutes

on the sentence. The appellant has not convinced this court that this was unfair or even appeared unfair. *See Lentz*, 54 M.J. at 821.

Further, as in *Lentz*, the appellant has failed to present any evidence that the military judge was biased in his case. Instead, he relies solely on the length of the military judge's deliberation. Appellant's Brief of 31 Jan 2003 at 4-7. Without more, the appellant's argument is not well taken. Accordingly, we decline to grant relief.

As addressed above, we presume that there is no actual unfairness or any appearance of unfairness in the appellant's case based on the length of time of deliberation by the military judge. However, as a matter of course, if a military judge were to refuse to adequately consider the matters presented by an accused during the sentencing phase of the court-martial, then that judge could be challenged as having an inelastic attitude toward sentencing. *See United States v. Weathersby*, 48 M.J. 668, 673 (Army Ct.Crim.App. 1998). After review of the entire record, we see no evidence of the military judge having disregarded the appellant's excellent military character as evidence in mitigation. As such, we decline to grant relief.

Sentence Appropriateness

In the appellant's third assignment of error, he contends that the nature of the offenses and his character do not warrant imposition of sixteen years confinement and a

dishonorable discharge. The appellant avers that this court should approve only so much of the sentence as provides for confinement for seven to ten years, reduction to pay grade E-1, and a bad-conduct discharge. We disagree.

A court-martial may impose any legal sentence it deems appropriate. *United States v. Turner*, 14 C.M.A. 435, 437, 34 C.M.R. 215, 217 (1964); RULE FOR COURTS-MARTIAL 1002, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). On review, a military court of criminal appeals "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ. Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). An appropriate sentence results from an individualized consideration based upon the nature and seriousness of the offense and the character of the offender. *United States v. Rojas*, 15 M.J. 902, 919 (N.M.C.M.R. 1983)(citing *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982)) *aff'd,* 20 M.J. 330 (C.M.A. 1985). Military courts of criminal appeals are tasked with determining sentence appropriateness, as opposed to bestowing clemency, which is the prerogative of the convening authority. *Healy*, 26 M.J. at 395; R.C.M. 1107. A sentence should not be disturbed on appeal unless the harshness of the sentence is so disproportionate as to cry out for sentence

equalization. *United States v. Usry,* 9 M.J. 701, 704 (N.C.M.R. 1980).

The Supreme Court of the United States stated in *Coker v. Georgia*, 433 U.S. 584, 598 (1977), that "[r]ape is without doubt deserving of serious punishment[.]" Further, the Court of Appeals for the Armed Forces has also recognized rape as a serious crime. *United States v. Reist*, 50 M.J. 108, 110 (C.A.A.F. 1999); *United States v. Hudson*, 46 M.J. 226, 228 (C.A.A.F. 1997). Also, our superior court has recognized the aggravating nature of criminal conduct involving noncommissioned officers. *United States v. Thompson,* 22 M.J. 40, 41 (C.M.A. 1986)(noting that noncommissioned officers by virtue of their rank and authority have the responsibility to maintain high personal standards).

The appellant was convicted of raping his own niece on two separate occasions. After reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268. As such, granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96.

Conclusion

Accordingly, the findings and the sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

Appendix O

UNITED STATES, Appellee

v.

Vincent FRANCOIS
Ship's Serviceman Third Class (E-4), U.S. Navy,
Appellant

No. 05-0478

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200101967

September 11, 2006, Ordered

Counsel for Appellant: LT Anthony Yim, JAGC, USNR.

Counsel for Appellee: LT Mark H. Herrington, JAGC, USNR.

On consideration of the granted issue, in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Rodriguez-Rivera, 63 M.J. 372 (C.A.A.F. 2006), we conclude that Appellant was denied his due process right to speedy post-trial review and appeal, that the error was not harmless beyond a reasonable doubt, but that "to fashion relief that would

be actual and meaningful in this case would be disproportionate to the possible harm generated from the delay." *Id.* at 386. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in United States v. Moreno, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix P

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER D.A. WAGNER R.W. REDCLIFF

UNITED STATES

v.

Vincent FRANCOIS
Ship's Serviceman Third Class (E-4), U.S. Navy

NMCCA 200101967 Decided 14 March 2005

Sentence adjudged 16 February 2001. Military Judge: J.W. Rolph. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Mid-Atlantic, Norfolk, VA.

LCDR E.J. MCDONALD, JAGC, USN, Appellate Defense Counsel

LT KYLE KNEESE, JAGC, USNR, Appellate Defense Counsel

LT CHRISTOPHER BURRIS, JAGC, USNR, Appellate Government Counsel

LCDR TIMOTHY CURLEY, JAGC, USNR, Appellate Government Counsel

PER CURIAM:

We have examined the record of trial, the assignment of error that the appellant served unlawful confinement, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *See* Articles 59(a) and 66(c), Uniform Code of Military Justice, 10 U.S.C. §§ 859(a) and 866(c).

The military judge sentenced the appellant to a dishonorable discharge, confinement for 16 months, and reduction to pay grade E-1, but recommended that the convening authority (CA) suspend confinement in excess of 6 months. There was no pretrial agreement. In response to the staff judge advocate's recommendation to affirm the sentence as adjudged, the trial defense counsel requested that the CA follow the military judge's recommendation. Seven months after trial, the CA approved the sentence, but suspended confinement in excess of 11 months. The appellant was released from confinement 2 days after the CA's action. But, since the appellant was credited with 119 days of pretrial confinement, he actually served 11 days more than he should have. Automatic forfeitures and the

adjudged reduction in grade were deferred until the CA's action. The appellant requests that the dishonorable discharge be remitted to a bad-conduct discharge.

It is unfortunate that the appellant served additional confinement as a result of clemency by the CA. But, under the circumstances, and finding no evidence of bad faith by the Government, we decline to grant relief. *See United States v. Spaustat,* 57 M.J. 256 (C.A.A.F. 2002); *United States v. Yunk,* 53 M.J. 145 (C.A.A.F. 2000); *United States v. Rosendahl,* 53 M.J. 344 (C.A.A.F. 2000); *United States v. Kinzer,* 56 M.J. 741 (N.M.Ct.Crim.App. 2002).

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL

Clerk of Court

Appendix Q

UNITED STATES, Appellee

v.

David A. GAINES, Fireman Controlman Second Class (E-5), U.S. Navy

No. 06-0127/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200300828

September 11, 2006, Ordered

Counsel for Appellant: LT Brian L. Mizer, JAGC, USNR.

Counsel for Appellee: LT Craig A. Poulson, JAGC, USNR.

On consideration of the granted issue in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in *United States v. Moreno*, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix R

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

CHARLES Wm. DORMAN C. A. PRICE R.C. HARRIS

UNITED STATES

v.

David A. GAINES
Fireman Controlman Second Class (E-5), U.S. Navy

61 M.J. 689

NMCCA 200300828 Decided 29 July 2005

Sentence adjudged 3 May 2002. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Mid-Atlantic, Norfolk, VA.

Capt JAMES D. VALENTINE, USMC, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USNR, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was tried before a general court-martial composed of a military judge, sitting alone. Contrary to his pleas, the military judge convicted the appellant of indecently assaulting two adult females, on different occasions. As a result, the appellant stands convicted of violating Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The adjudged and approved sentence consists of confinement for 2 years, reduction to pay grade E-1, and a bad-conduct discharge. In taking action on 19 February 2003, the convening authority remitted all confinement in excess of 12 months. This action was taken to comply with an agreement reached between the appellant and the convening authority midway through the appellant's court-martial. Additionally, as a matter of clemency, the convening authority waived automatic forfeitures of pay for a period of 6 months from the date of his action. The record is silent as to whether the appellant benefited from this clemency.

The appellant has raised five assignments of error,[1] the

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[1] I. THE EQUAL PROTECTION COMPONENT OF FIFTH AMENDMENT DUE PROCESS WAS VIOLATED BELOW AND IS BEING FURTHER VIOLATED NOW BECAUSE THE MILITARY JUDGES AND THE JUDGES OF THIS COURT SERVE WITHOUT THE PROTECTION OF A FIXED TERM OF OFFICE, WHEREAS THOSE IN THE ARMY ENJOY SUCH PROTECTION BY REGULATION[.]

first four of which will be addressed below. We have reviewed the record of trial, the appellant's brief and assignments of error, the Government's answer, and the appellant's reply. We have also considered the excellent oral arguments presented by appellate counsel on 11 May 2005. Based on that review, we conclude that corrective action is required. Following our corrective action, we conclude that the findings and sentence are correct in law and fact, and that no error remains that is

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II. THE GOVERNMENT FAILED TO PROVE APPELLANT'S GUILT BEYOND A REASONABLE DOUBT.

III. A SENTENCE THAT INCLUDES CONFINEMENT FOR TWO YEARS, REDUCTION TO E-1, AND A BAD[-]CONDUCT DISCHARGE IS INAP[P]ROPRIATELY SEVERE IN LIGHT OF THE NATURE OF THE OFFENSES.

IV. THIS COURT SHOULD REMEDY THE UNNECESSARILY LENGTHY POST-TRIAL DELAY IN THIS CASE BY SETTING ASIDE THE ADJUDGED BAD-CONDUCT DISCHARGE.

V. THE MILITARY JUDGE ERRED WHEN HE FAILED [TO] SUP[P]RESS THE STATEMENTS REGARDING MS. [S].

materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant stands convicted of two indecent assaults. One assault was committed against a civilian female, Ms. S, on 25 November 2000, in the off-base house of one of the appellant's girlfriends. The other assault was committed against Seaman Apprentice (SA) P on 3 March 2001, in the off-base house in which another of the appellant's girlfriends was then living.

Ms. S testified that she had seen the appellant at Rumors, an on-base bar in Dahlgren, VA, the evening before the assault. She went there to meet her friend, Ms. D, who worked as a bartender at Rumors. Ms. S and Ms. D were best friends, and Ms. S planned on spending the night at Ms. D's house that evening. After Rumors closed, the two of them went to Ms. D's house. Prior to that evening, Ms. D had been dating the appellant. Shortly after Ms. S and Ms. D arrived at her house, the appellant arrived, letting himself in. He walked into Ms. D's bedroom unannounced. Upon the appellant's arrival, Ms. S retreated, pillow and blankets in hand, to sleep on the living room sofa.

Ms. S testified that she awoke early the next morning with the appellant's finger in her vagina. She quickly got up and went into Ms. D's room and woke her up. Ms. D testified that when Ms. S came into her room she was screaming and crying, saying the appellant's name over

and over again. After Ms. D shook Ms. S, Ms. S told her what the appellant had done. Ms. D got up and left the room in search of the appellant. Ms. S did not report the incident to the police for several days.

The appellant testified that he spent the night with Ms. D and that they had sexual relations that night. The next morning, as he was leaving, he woke Ms. S to ask her about a cigarette lighter she had borrowed. He testified that when he woke her, she pulled him down towards her and started kissing him. She soon stopped and commented that he was not who she thought he was. He believed Ms. S was playing "head games" with him. He testified that he terminated the interchange with Ms. S by grabbing her buttocks and telling her that he would not tell
Ms. D.

On the evening of 3 March 2001, SA P was at Rumors with Seaman (SN) K. SA P was 19 years old. SN K was 35 years old. SA P was both shorter and heavier than SN K. The appellant was also at Rumors, and he talked with them that evening. SA P and SN K left Rumors around 2300, eventually ending up at the off-base house where SN K was soon to be living. Along the way, they stopped at a convenience store and purchased some alcoholic beverages. Although SA P was not 21, she consumed some of those beverages once they got to the house. Eventually, the appellant and another Sailor showed up at the house. Two other Sailors arrived at the house some time later.

The house belonged to a petty officer, from whom SN K was going to be renting a room. Previously, SN K had "house-sat" for the petty officer. During the periods of time that she house-sat, the appellant would visit SN K there. During those visits the appellant and SN K engaged in sexual relations. During the time in which SN K house-sat, there was only one bedroom in the house. When the appellant and SN K engaged in sexual relations, they did so in that bedroom. The petty officer testified that when the lights are turned off in that bedroom at night, it becomes very dark in that room. SN K was in the process of moving into the house, and a second bedroom had been set up for her. The second bedroom was in a room that had previously been used for storage. The appellant was not aware that SN K had a bedroom of her own.

SA P knew the appellant because she had worked with him. After the appellant arrived at the house, he, SN K, and SA P sat on the sofa watching television in the living room. All were drinking, and the appellant testified that he had been drinking before he arrived. While on the couch, the appellant was whispering in SN K's ear, and SN K testified that she was planning on having sex with the appellant that evening. SN K left the living room and went to bed, leaving the appellant, SA P, and the other Sailors in the living room. SA P was lying on the couch with her legs in the appellant's lap. Eventually, she got up and went to bed. She testified that the appellant followed her to the bedroom, but that he did not enter the room. SA P went to the bedroom in which SN K and the accused had previously

engaged in sexual relations, laid down on the bed and quickly fell asleep.

The appellant testified that he stayed in the living room for a while and did not follow SA P to the bedroom. Later, however, the appellant got up to go be with SN K, going to the bedroom where he had previously stayed with her. The appellant went in and closed the door. He began to massage the feet of the woman who was on the bed, and eventually touched her legs and pelvic area. This contact woke SA P. The appellant testified that he immediately apologized, telling SA P that he thought she was SN K. SA P became upset and went into the room where SN K was staying. She testified that she told SN K that the appellant "had gone into the wrong room." Record at 256. While the appellant acknowledged that he touched SA P, he also testified that he believed that he was with SN K. Contributing to his mistake were the facts that he had quite a bit to drink, that the room was very dark, and that he was not aware that SN K had her own room.

During the appellant's case-in-chief, he presented evidence of his good military character through the testimony of four witnesses and the stipulated testimony of another. In fact, the appellant had previously been named "Junior Sailor of the Quarter" and "Junior Sailor of the Year." As of the date of his court-martial, the appellant had been on active duty for 8 years. During that period of time, he had not been subject to any disciplinary actions.

Constitutional Due Process

The appellant's first assignment of error asserts that he has been denied the equal protection of the law due to him under the Due Process Clause of the Fifth Amendment to the United States Constitution. The appellant concedes that there is no fundamental due process requirement that military judges be provided with fixed terms of office. He argues, however, that because the Army and Coast Guard have provided for fixed terms and the Navy has not, this alone deprived him of equal protection. The appellant avers that this court should set aside his conviction and sentence with leave to conduct further proceedings presided over by a military trial judge who enjoys a fixed term of office. We disagree.

"No person shall be . . . deprived of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. V. Our superior court has held that the equal protection component of the Fifth Amendment's Due Process Clause is applicable to the military system of criminal justice. *See, e.g., United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994); *United States v. Tuggle*, 34 M.J. 89, 91-92 (C.M.A. 1992); *United States v. Santiago-Davila*, 26 M.J. 380, 389-90 (C.M.A. 1988). Further, the appellant is correct that "[t]he power to 'prescribe regulations providing for the manner in which military judges are detailed,' which Congress conferred on the service secretaries, Article 26(a), UCMJ, does not preempt the President's authority . . . to require that military judges have the protection of fixed terms of office." Appellant's Brief of 25 Jun 2004 at 7-8.

The Supreme Court has held, however, that the lack of a fixed term of office for military judges does not violate either the Appointments Clause or the Due Process Clause of the Fifth Amendment. *Weiss v. United States*, 510 U.S. 163, 176-81 (1994). Further, the Court of Appeals for the Armed Forces has also concluded that the differences between Article III courts and military courts do not deprive servicemembers of equal protection under the Fifth Amendment because an appellant is entitled under Article 67a, UCMJ, to seek review by the Supreme Court, which is an Article III court. *United States v. Loving*, 41 M.J. 213, 295-96 (C.A.A.F. 1994), *aff'd*, 517 U.S. 748 (1996).

Congress has sanctioned distinctions between the services in authorizing each service secretary to prescribe regulations for the manner in which military judges are detailed. Art. 26(a), UCMJ. Congress has also sanctioned distinctions between the services in authorizing each Judge Advocate General to establish a Court of Criminal Appeals and to prescribe uniform rules of procedure for their respective Court of Criminal Appeals. Art. 66(a) and 66(f), UCMJ. "Congress has never required such uniformity among the services, and it has consistently authorized the Secretary of each armed force to promulgate regulations to meet special needs of his service, as determined by him." *United States v. Hoesing*, 5 M.J. 355, 358 (C.M.A. 1978).

We, therefore, conclude that the assignment of error has no merit. Accordingly, we decline to grant relief.

Sufficiency of the Evidence

In his second assignment of error, the appellant argues that the Government failed to establish his guilt beyond a reasonable doubt. He challenges both the legal and factual sufficiency of the evidence.

The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). Applying that standard, we have no difficulty concluding that the evidence of record is legally sufficient to support the convictions for both indecent assaults.

The test for factual sufficiency, however, is more favorable to the appellant. It requires this court to be convinced of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)(citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984)). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So too may we.

In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Based on that review, we are convinced beyond a reasonable doubt of the appellant's indecent assault upon Ms. S, but we are not convinced of his guilt concerning the alleged indecent assault upon SA P.

In order to convict the appellant of the offense of indecent assault the Government was required to prove that the appellant assaulted a person who was not his spouse, that his acts were done to gratify his lust or sexual desires, and that under the circumstances, the appellant's conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 63b. Since indecent assault necessarily includes a battery, it is appropriate to also consider the elements for an assault consummated by a battery. There are but two elements for that offense: first, that the appellant did bodily harm to another, and second, that the harm was done with unlawful force or violence. *Id.* at ¶ 54b(2).

We have examined the evidence of the appellant's indecent assault upon Ms. S and find that the Government met each and every one of the required elements. Having set forth the facts above, we give credence to the testimony of Ms. S. We have thoroughly considered the appellant's version of what happened

between him and Ms. S and do not find his version of the facts to be worthy of belief.

The appellant's argument concerning the Government's proof of the alleged indecent assault upon SA P is more compelling. Further, the Government has an additional burden of proof with respect to that allegation because the appellant has raised an affirmative defense. In addition to proving the elements set out above, the Government also has the burden of disproving the affirmative defense, and it must do so beyond a reasonable doubt. RULE FOR COURTS-MARTIAL 916(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

The facts give rise to the defense of mistake of fact. Specifically, we hold that the mistake of fact in this case goes to the issue of consent. Our superior court has recognized that where an accused mistakenly identifies his sex partner for someone who he believes would normally consent, but in fact the partner was someone else, a mistake of fact defense is raised. *United States v. Adams*, 33 M.J. 300, 301 (C.M.A. 1991). In that case, however, the appellant had pled guilty, and the Court of Military Appeals found his statements that raised the defense were inconsistent with his guilty plea. *Id.* at 302-03.

A similar rationale applies to the case before us. Had the victim consented to the touching in this case, there would be no indecent assault, because there would be no assault. *See United States v. Rath*, 27 M.J. 600, 607

(A.C.M.R. 1988). Thus, if the appellant had an honest and reasonable belief that the person he was touching consented to the touching, he would have a complete defense to the alleged indecent assault upon SA. P. *See United States v. Peterson*, 47 M.J. 231, 234-35 (C.A.A.F. 1997). Furthermore, the appellant's asserted belief that he was with SN K rather than SA P -- if honest and reasonable -- also raises concern as to whether his conduct was service discrediting or prejudicial to good order and discipline. *See Adams*, 33 M.J. at 302; *United States v. Sadler*, 29 M.J. 370, 375 (C.M.A. 1990).

Having concluded that the evidence reasonably raises the defense of mistake of fact, we next turn to the question of whether the Government disproved the defense beyond a reasonable doubt. *See United States v. Pierce*, 40 M.J. 601, 606 (A.C.M.R. 1994). We hold that it did not. We reach that conclusion primarily based upon the testimony of both SN K and SA P. Through their testimony it is clear that the appellant had an ongoing sexual relationship with SN K and that he had consummated that relationship in the bedroom wherein SA P was sleeping that night. SN K and the appellant were flirting earlier that evening, and SN K was planning on having sexual relations with the appellant that night. Finally, the appellant expressed concern to SA P that she was not who he thought she was and, when SA P awoke SN K, she told SN K that the appellant had gone into the wrong room. Based upon this evidence, and other evidence of record, we are not convinced beyond a reasonable doubt that the defense of

mistake of fact did not exist. Accordingly, we shall take corrective action in our decretal paragraph.

Speedy Review

In his fourth assignment of error, the appellant asserts that he was denied his right to a speedy post-trial review of his conviction. To assist in our analysis of this assignment of error, we provide the following chronology of the review of the appellant's four-volume, 976-page record of trial.

3 May 02	Sentence adjudged.
8 Jul 02	Civilian counsel (CC) inquires regarding status of record of trial.
22 Aug 02	CC complains of delay in preparation of record of trial.
22 Oct 02	Record of trial authenticated.
25 Oct 02	CC requests authenticated record of trial.
6 Nov 02	CC submits R.C.M. 1105 matters to Convening Authority, including objections to post-trial delay.

31 Jan 03	Staff Judge Advocate's Recommendation (SJAR) completed.
3 Feb 03	R.C.M. 1106 response to SJAR, including objection to post-trial delay.
19 Feb 03	Convening Authority's Action.
22 Apr 03	Record of trial received at Navy-Marine Corps Appellate Review Activity.
29 Apr 03 with this court.	Record of Trial docketed
25 Jun 04	Appellant's Brief filed.
3 Nov 04	Appellant files Motion for Oral Argument
22 Nov 04	Appellant files Motion to Attach email from appellant, dated 27 Oct 04, pleading for a decision in this case.
21 Dec 04	Government Answer filed.
31 Jan 05	Appellant's Reply Brief filed.

10 May 05	Appellant files Motion to Attach letters from employers concerning status of appellant's security clearance.
11 May 05	Oral Argument before this court.

We consider four factors in determining whether post-trial delay violates the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice. . . .'" *Id.* (quoting *Toohey*, 60 M.J. at 102).

To begin, the delay in this case is not so extreme as to give rise to a presumption of prejudice. In this case, the lengthy record of trial was prepared and the convening authority took action in less than 10 months from the date of trial--contrary to the appellant's assertions. Appellant's Reply Brief of 31 Jan 2005 at 5. We do find, however, that the period of time between the date of trial

and authentication of the record is facially unreasonable. No explanation has been provided for this delay. Furthermore, early in the post-trial process the appellant raised the issue of a timely review, to include inquiring about the preparation of the record and receipt of an authenticated copy of the record. The appellant has also presented some evidence of possible prejudice in the letters from two employers. In light of Secretary of the Navy Instruction (SECNAVINST) 5510.30A (10 Mar 1999), however, we view the appellant's concerns about the delay impacting his ability to obtain a security clearance to be speculative--at best.

We have granted the appellant's motion to attach a letter from his former employer and one from his current employer. The letter from the former employer indicates that employment was terminated because he was unable to obtain a required security clearance. The letter from the current employer also informed the appellant of the requirement to obtain a security clearance. Appendix G of SECNAVINST 5510.30A provides "Adjudication Guidance" to obtain security clearances. While clearance determinations are made on a case by case basis, the appellant's conviction of a sexual offense in and of itself raises a security concern, not only because it is a conviction but also because the conduct "reflects a lack of discretion or judgment." *Id.* at G-2, ¶ 5g and G-10. Thus, unlike the situation in *Jones,* it is not the delay in resolving the appellant's appeal that possibly stands in his way of landing desired employment, it is the conviction itself and the appellant's sexual misconduct.

Under the facts of this case, we hold that the appellant is not entitled to any relief due to the length of time it has taken to complete the review of his case. While we decline to grant specific relief for that delay, we will consider it in our reassessment of the sentence--in determining what sentence is appropriate. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Sentence Appropriateness

In the appellant's third assignment of error he argues that the adjudged and approved sentence is inappropriately severe. In light of our determination that the evidence is factually insufficient to sustain his conviction for the alleged indecent assault of SA P, we must reassess the sentence in accordance with established principles set out below. Nevertheless, we have given consideration to this assignment of error. In arriving at an appropriate sentence upon reassessment, we have taken into account all the evidence of record, all the clemency matters the appellant submitted to the convening authority, and all the materials he has submitted to this court. As noted above, we have also considered the post-trial delay in this case.

In conducting our reassessment of the sentence, we have reassessed the sentence as approved by the convening authority. In determining the base line from which to begin reassessment we have considered the holdings of this court in *United States v. Dedert*, 54 M.J. 904, 909 (N.M.Ct.Crim.App. 2001) and *United States v. Olinger*,

45 M.J. 644, 650 (N.M.Ct.Crim.App. 1997). Those cases suggest that the base line for reconsideration should be the approved sentence as partially remitted by the convening authority. We hold that those cases are not controlling in this case. We not only distance ourselves from the holding in those cases concerning the effect of remitting a portion of an approved sentence, but we also hold that those cases are limited to situations where the Navy Clemency and Parole Board has taken action on a case prior to our review. Furthermore, we note that in those cases this court did not conduct a reassessment of the sentences.

We find it appropriate to begin our reassessment with a base line of 2 years confinement for the following reasons. First, were this court to send the case back for a rehearing on sentencing, court members would be instructed that the maximum sentence they could adjudge includes confinement for 5 years. MCM, Part IV, ¶ 63e; *see also United States v. Gibson*, 43 M.J. 343, 346 n.3 (C.A.A.F. 1995); *United States v. Lawson*, 34 M.J. 38, 40 (C.M.A. 1992). Second, the convening authority approved a sentence that included 2 years confinement. The remission of a punitive discharge by the convening authority, or by operation of law when a suspended punitive discharge is remitted at the end of a period of suspension, does not deprive this court of jurisdiction, even though the punitive discharge will never be executed. Similarly, the convening authority determined that a sentence that included 2 years confinement was an appropriate punishment for the appellant's crimes. The fact that the convening authority

immediately remitted a portion of the confinement does not mean that he disapproved the portion he remitted, it only means that the appellant will never have to serve confinement in excess of 12 months as a result of his conviction by this court-martial. Finally, in conducting a reassessment of the sentence, the applicable case law focuses on the question of the minimum sentence that the sentencing authority would have adjudged absent the error that necessitates the reassessment. *See United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).

In conducting our reassessment in this case, we note that of the two specifications of which the appellant was convicted at trial, the indecent assault upon Ms. S was by far the more egregious of the two. We have also considered the facts that the appellant was a petty officer, *see United States v. Thompson*, 22 M.J. 40, 41 (C.M.A. 1986), and married, at the time of this offense. Our action below moots the appellant's assignment of error concerning the appropriateness of the sentence.

Conclusion[2]

We affirm the appellant's conviction of Charge II, and its

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[2] In his fifth assignment of error the appellant avers that the military judge erred in failing to suppress the appellant's pretrial statement concerning Ms. S. We summarily reject this assignment of error because no such statement was admitted into evidence.

specification. We set aside, and order dismissed, the appellant's conviction of the Additional Charge and its supporting specification.

As a result of our action on the findings, we have reassessed the sentence in accordance with the principles of *Tardif, Cook, Peoples*, and *Sales*. Upon reassessment of the sentence, we approve only so much of the sentence as extends to confinement for 12 months, reduction to pay-grade E-1, and a bad-conduct discharge. The supplemental promulgating order will reflect the findings and the sentence as modified by this decision.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL

Clerk of Court

Judge HARRIS participated in the decision prior to detaching from the court.

Appendix S

UNITED STATES, Appellee

v.

Timothy G. GILMORE, Lance Corporal (E-3), U. S. Marine Corps, Appellant

No. 06-0321/MC

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200401106

September 11, 2006, Ordered

Counsel for Appellant: LT Richard H. McWilliams, JAGC, USNR.

Counsel for Appellee: LT Mark H. Herrington, JAGC, USNR.

On consideration of the granted issue, in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in United States v. Moreno, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix T

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER D.O. VOLLENWEIDER E.E. GEISER

UNITED STATES

v.

Timothy G. GILMORE
Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200401106 Decided 31 January 2006

Sentence adjudged 13 May 2003. Military Judge: S.M. Immel. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d FSSG, U.S. Marine Corps Forces, Atlantic, Camp Lejeune, NC.

LT RICHARD H. MCWILLIAMS, JAGC, USNR, Appellate Defense Counsel

LT MARK H. HERRINGTON, JAGC, USNR,

Appellate Government Counsel
AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

The appellant was convicted, consistent with his pleas, by a military judge sitting as a general court-martial of a false official statement and indecent assaults on two female Marines, in violation of Articles 107 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 24 months, total forfeiture of all pay and allowances and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant raises three assignments of error. First, he asserts that the military judge's finding of guilty to the specification under Charge I (false official statement) prejudiced the appellant's right to offer a defense at his non-judicial punishment (NJP) proceedings. Second, the appellant asserts that he has been denied his right to speedy post-trial review. Finally, the appellant in a summary assignment of error avers that the specifications under Charges I and II are fatally defective in that they fail to allege that he was on active duty and subject to the UCMJ at the time of the offenses. The appellant requests that this court set aside his conviction to the specification under Charge I and that we set aside the approved punitive discharge.

We have examined the record of trial, the assignments of error, the Government's answer and the appellant's reply. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

False Statement at NJP

The appellant asserts that his substantial right under Article 15, UCMJ, to present a defense at his NJP hearing was materially prejudiced by his later conviction for making a false official statement to his commanding officer at NJP. We disagree. While the appellant has a right under Article 15, UCMJ, to present evidence at a nonjudicial punishment hearing, he does not have the right to lie or testify falsely to the finder of fact. At NJP, the appellant may freely choose to exercise his absolute right to remain silent. When he elected to waive that right and speak, he was obligated to speak truthfully. *United States v. Solis*, 46 M.J. 31, 35 (C.A.A.F. 1997). We also note that there is no requirement at NJP that an accused enter a plea. Even if there were, the appellant's exculpatory statements went beyond merely saying he wanted to plead "not guilty" and make the Government prove the case against him. During providency, the appellant specifically admitted that his purpose in making the statements was to "deceive the Colonel" in order to change his decision. Record at 212. We find that the military judge did not prejudice a substantial right of the appellant by finding him guilty of Charge I.

Post-Trial Delay

The appellant also asserts that a delay of 476 days from the date sentence was announced to docketing with this court is unreasonable. We have examined the record of trial, the assignment of error regarding post-trial processing delay, the Government's answer and the appellant's reply. We consider four factors in determining if post-trial delay violates appellant's due process rights: (1) length of the delay; (2) reasons for the delay; (3) the appellant's assertion of the right to a timely appeal; and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id.*

In the instant case, there was a delay of about 476 days from the date of sentencing to the date the case was docketed with this court. We find this unexplained delay of almost 1½ years to be facially unreasonable. *United States v. Brown*, __ M.J. __, 2005 CCA LEXIS 372, No. 200500873 (N.M.Ct.Crim.App. 30 Nov 2005)(en banc). This substantial unexplained delay triggers a due process review.

We balanced the length of delay in this case in the context of the three remaining *Jones* factors. Regarding the second factor, reasons for the delay, the Government

offers no explanation whatsoever for the 476-day delay. With respect to the third factor, we find no evidence that the appellant asserted his right to timely post-trial review any time prior to filing his appellate brief. Finally, regarding the fourth factor, the appellant makes no assertion of, and this court finds no evidence of, material prejudice to a substantial right resulting from post-trial delay in this case. Considering all four factors, we conclude that there has been no due process violation due to post-trial delay.

We are also aware of our authority to grant relief under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866, but we decline to do so. *Toohey*, 60 M.J. at 103; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F 2002).

Conclusion

The appellant's summary assignment of error is without merit. We affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court

Appendix U

UNITED STATES, Appellee

v.

Christopher L. HARRIS
Sergeant (E-5), U. S. Marine Corps

No. 06-0704/MC

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200500448

October 30, 2006, Ordered

Counsel for Appellant: LT Richard H. McWilliams, JAGC, USNR.

Counsel for Appellee: LT Craig A. Poulson, JAGC, USNR.

On consideration of the petition for grant of review of the decision of the Navy-Marine Corps Court of Criminal Appeals, and in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, we conclude that any error in that regard was harmless beyond a

reasonable doubt. Accordingly, it is, by the Court, this 30th day of October, 2006,

ORDERED:

That said petition is hereby granted on Issue IV as raised by appellate defense counsel; and

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

Appendix V

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

W.L. RITTER J.F. FELTHAM K.K. THOMPSON

UNITED STATES

v.

Christopher L. HARRIS
Sergeant (E-5), U. S. Marine Corps

NMCCA 200500448 Decided 24 April 2006

Sentence adjudged 6 November 2003. Military Judge: D.M. Jones.

Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Wing Support Squadron 373, MWSG 37, 3d MAW, MarForPac, San Diego, CA.

LT RICHARD MCWILLIAMS, JAGC, USNR, Appellate Defense Counsel

LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of making a false official statement and malingering, in violation of Articles 107 and 115, Uniform Code of Military justice, 10 U.S.C. §§ 907 and 915. The appellant was sentenced to a bad-conduct discharge, confinement for 12 months, forfeiture of $767.00 pay per month for 12 months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant raises four assignments of error. First, he alleges that the military judge admitted confidential communications between the appellant and his psychiatrist in violation of MILITARY RULE OF EVIDENCE 513, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Second, he asserts that his statement to a physician concerning how he incurred his injury was not an 'official statement' under Article 107, UCMJ, rendering his plea thereto improvident. Third, he claims that his separate convictions for malingering and false official statement constitute an unreasonable multiplication of charges. Fourth, he asserts that he was denied his right to speedy review of his court-martial.

We have examined the record of trial, the appellant's four assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant went to the emergency room of the Naval Medical Center in San Diego the morning of 20 January 2003. He had a superficial wound to his abdomen and told the attending physician, LCDR Knight, that he had accidentally cut himself with a knife while attempting to open a can of fruit. He was released, but returned later that day and asked the triage nurse if he could see a psychiatrist. The appellant stated to the nurse that he had self-inflicted the wound. Subsequently, he was seen by the duty psychiatrist, LT Ziajko. He told her he had stabbed himself in order to avoid being deployed. He also informed LT Ziajko that he would make further attempts to harm himself to avoid deploying. As a response, LT Ziajko contacted the appellant's command in an effort to delay or postpone his deployment in order to ensure he did not make any more attempts to harm himself. LT Ziajko disclosed to the appellant's command his admission that he had stabbed himself in order to avoid deployment and his threat to further harm himself if forced to deploy.

Admission of Evidence

The appellant asserts that the military judge erred when he admitted evidence of confidential communications made to his psychiatrist and medical psychiatry records under exceptions to MIL. R. EVID. 513(d). We disagree.

The appellant moved to suppress his communications to LT Ziajko as being privileged under MIL. R. EVID. 513(a). The military judge found that the appellant was a patient and LT Ziajko a psychiatrist within the meaning of MIL. R. EVID. 513 and that his communications to her were privileged. However, he denied the defense motion in limine, and ruled the communications (and attendant medical record entries) admissible under MIL. R. EVID. 513(d)(4), (5) and (6) exceptions, holding that the communications could be divulged because: (1) the appellant was a possible danger to himself; (2) clearly contemplated a future crime of malingering by threatening to harm himself further if he had to deploy; and (3) disclosure was necessary to protect the accomplishment of a military mission – the imminent deployment of his unit to a combat zone.

In reviewing a military judge's denial of a suppression motion, appellate courts apply an abuse of discretion standard. *United States v. Simpson,* 54 M.J. 281, 283 (C.A.A.F. 2000)(citing *United States v. Young,* 49 M.J. 265, 266-67 (C.A.A.F. 1998)). This is the standard of review for all evidentiary rulings. The military judge's "'findings of fact will not be overturned unless they are

clearly erroneous or unsupported by the record,'" while we review conclusions of law *de novo*. *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999)(quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)). This standard for our review of the military judge's findings of fact is a strict one, requiring more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). A military judge's admission of evidence will be reversed only when his actions are "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)). Additionally, we must consider the evidence "in the light most favorable" to the "prevailing party." *Reister*, 44 M.J. at 413.

MIL. R. EVID. 513 was promulgated in the wake of *Jaffee v. Redmond*, 518 U.S. 1 (1996), where the Supreme Court recognized a psychotherapist-patient privilege in federal courts. The Court noted that possible situations could exist where the privilege must give way such as where there was "a serious threat of harm to the patient or to others [which could only be averted] by means of a disclosure by the therapist." *Id.* at 18 n.19. Prior to *Jaffee*, service courts did not recognize a psychotherapist-patient privilege. *United States v. Mansfield*, 38 M.J. 415 (C.M.A. 1993); *United States v. Toledo*, 25 M.J. 270 (C.M.A. 1987). Post-*Jaffee*, our superior court has recognized that the president has "occupied the field" concerning privileges in the military. *United States v. Rodriguez*, 54 M.J. 156,

160 (C.A.A.F. 2000). When the President promulgated MIL. R. EVID. 513, he did not simply adopt *Jaffee;* rather, he created a limited psychotherapist privilege for the military. The appellant urges this court to readdress the dangerous-patient exception language of *Jaffee* and recognize two separate privilege assertions concerning disclosure by the psychiatrist to the servicemember's command and testimony by the psychiatrist in judicial proceedings. This court is without authority to do so. In the absence of a constitutional or statutory requirement to the contrary, the decision as to whether, when, and to what degree the privilege will be expanded or modified in the military rests with the President, not this court. *Rodriguez,* 54 M.J. at 161.

In this case, we find the military judge's findings of fact to be supported by the record and not clearly erroneous. This issue is without merit.

Improvident Plea

The appellant's second assignment of error questions the factual basis for the appellant's plea of guilty to the offense

of making a false official statement. He claims that his statement to a Navy medical officer that he accidentally stabbed himself while opening a can of fruit was not made in the line of duty and was therefore not "official" within the meaning of Article 107, UCMJ. We disagree.

This court has held that statements given to a treating physician in a naval medical facility concerning the origin of an injury constitite an official statement. *See United States v. Whitley,* 38 C.M.R. 724, 736 (N.B.R. 1976). The military judge in this case conducted a full inquiry of the appellant concerning this offense, establishing a factual basis for his plea. Art. 45(a), UCMJ; *United States v. Care,* 40 C.M.R. 247, 253 (C.M.A. 1969). We find that the record does not reveal a substantial basis in law and fact for questioning the appellant's plea. *United States v. Prater,* 32 M.J. 433, 436 (C.M.A. 1991). This assignment of error is without merit.

Unreasonable Multiplication of Charges

In his third assignment of error, the appellant contends that his separate convictions for malingering and making a false official statement constitute an unreasonable multiplication of charges. He claims that the false statement was made in furtherance of the plan to malinger and, therefore, was substantially the same transaction. We disagree.

In determining whether there is an unreasonable multiplication of charges, this court considers five

factors:

(1) Did the accused object at trial; (2) Are the charges aimed at distinctly separate criminal acts; (3) Do the charges misrepresent or exaggerate the appellant's criminality; (4) Do the charges unreasonably increase the appellant's punitive exposure; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *United States v. Quiroz,* 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd,* 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

Applying these factors to the appellant's case, we find no unreasonable multiplication of charges. First, the appellant did not object at trial. Second, we view the charges as being directed at separate and distinct criminal conduct of the appellant. We are not persuaded by the appellant's argument that making a false official statement is an inherent element of malingering. For the same reason, we conclude that the method of charging did not exaggerate the appellant's criminality. With respect to the last two *Quiroz* factors, the method of charging the appellant did not expose him to greater punishment, nor is there any evidence of prosecutorial overreaching. This assignment of error has no merit.

Post-Trial Delay

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id.* (quoting *Toohey,* 60 M.J. at 102).

With regard to the first *Jones* factor, length of delay, we find the delay of 510 days between sentencing and docketing at this court to be facially unreasonable. Regarding the second *Jones* factor, reasons for the delay, the SJA explained that multiple deployments of the SJA and support judge advocates in support of Operations Enduring Freedom and Iraqi Freedom resulted in a severe manpower shortage in the unit's legal staff, directly impacting the court-martial review process.

With regard to the third *Jones* factor, we find no evidence that the appellant asserted his right to timely post-trial review prior to filing this assignment of error. Finally, regarding the fourth *Jones* factor, although the appellant asserts that the delay "effectively curtailed" his

opportunity for early release from confinement, we find no evidence of actual prejudice. Nor is there evidence of "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice. Thus, we conclude that there has been no due process violation due to the post-trial delay in this case.

We are also aware of our authority to grant relief under Article 66, UCMJ. *Toohey*, 60 M.J. at 103; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). Having considered these factors, we decline to grant relief.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

Appendix W

UNITED STATES,

v.

William R. HUMPHREY, Jr.
Corporal (E-4), U.S. Marine Corps, Appellant

No. 05-0552/MC

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200200787

September 11, 2006, Ordered

Counsel for Appellant: LT Richard H. McWilliams, JAGC, USNR.

Counsel for Appellee: LT Mark H. Herrington, JAGC, USNR.

On consideration of the granted issue, in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in United States v. Moreno, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix X

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.A. PRICE M.J. SUSZAN R.C. HARRIS

UNITED STATES

v.

William R. HUMPHREY, Jr.
Corporal (E-4), U.S. Marine Corps

NMCCA 200200787 Decided 22 April 2005

Sentence adjudged 22 March 2001. Military Judge: R.K. Fricke. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base Hawaii, Kaneohe Bay, HI.

LT COLIN A. KISOR, JAGC, USNR, Appellate Defense Counsel

Capt GLEN R. HINES, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of unauthorized absence, rape, forcible sodomy, assault, indecent acts, and communicating a threat, in violation of Articles 86, 120, 125, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 920, 925, 928, and 934. The appellant was sentenced to confinement for 7 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence and, except for the dishonorable discharge, ordered it executed.

We have carefully considered the record of trial, the appellant's two assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Factual and Legal Sufficiency

In the appellant's first assignment of error, he contends that the evidence is factually and legally insufficient to prove he is guilty of rape, sodomy, and indecent acts. The appellant avers that this court should set aside the findings for Charge IV, Charge V, and Specification 1 of Charge VII, dismiss these charges, and reassess the

sentence. We disagree.

The test for legal sufficiency is whether, considering the evidence admitted at trial in the light most favorable to the prosecution, a reasonable fact-finder could have found that all the essential elements were proven beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Spann*, 48 M.J. 586, 588 (N.M.Ct.Crim.App. 1998), *aff'd,* 51 M.J. 89 (C.A.A.F. 1999). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41; *Turner,* 25 M.J. at 325; *see* Art. 66(c), UCMJ. Reasonable doubt does not mean that the evidence contained in the record must be free from any and all conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). In exercising the duty imposed by this "awesome, plenary, *de novo* power," *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990), this court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge.

Contrary to the appellant's contentions, we find the victim's testimony supporting the charges of rape, forcible sodomy and indecent acts both consistent with the other evidence presented at trial and credible. We note that several of the appellant's close friends and co-

workers corroborated key aspects of the victim's testimony. Further, we are not persuaded that she had a motive to fabricate the charges against the appellant in this case.

After careful consideration of the record, we conclude that the evidence adduced at trial is both legally and factually sufficient for the charged offenses of rape, forcible sodomy, and indecent acts. Accordingly, we decline to grant relief.

Post-Trial Delay

In his second assignment of error, the appellant contends that he was denied his right to a speedy post-trial appellate review of his court-martial. The appellant avers that this court should reduce his confinement by two years or, alternatively, set aside the adjudged dishonorable discharge. We disagree.

The military judge sentenced the appellant on 22 March 2001 (Day Zero). On 30 October 2001, the convening authority took his action in the appellant's case (Day 222). On 26 April 2002, this court docketed the appellant's case for appellate review (Day 400). On 27 February 2004, appellate defense counsel filed his eighteenth motion for enlargement of time in the appellant's case (Day 686). On 30 March 2004, appellate defense counsel filed his brief (Day 1104). On 27 April 2004, the Government filed its answer to the appellant's brief and assignments of error (Day 1132). On 10 May 2004, appellate defense counsel filed his

reply brief (Day 1145).

Without question, an appellant has the right to a timely review of both the findings and the sentence of his court-martial. *United States v. Tardif,* 57 M.J. 219, 222 (C.A.A.F. 2002); *United States v. Khamsouk*, 58 M.J. 560, 561 (N.M.Ct.Crim.App. 2003)(citing *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001). Normally, before an appellant will be afforded relief stemming from a claimed denial of speedy review, the appellant "must demonstrate some real harm or legal prejudice flowing from the delay." *United States v. Bell,* 46 M.J. 351, 353 (C.A.A.F. 1997)(quoting *United States v. Jenkins,* 38 M.J. 287, 288 (C.M.A. 1993)). Unexplained and unreasonable delay may be so extreme that it will, of its own, raise a presumption of prejudice. *United States v. Toohey,* 60 M.J. 100, 102 (C.A.A.F. 2004).

The appellant acknowledges, and we agree, that he has not suffered prejudice or harm in this case. However, we are cognizant of this court's power under Article 66(c), UCMJ, to grant sentence relief for excessive post-trial delay even in the absence of actual prejudice. *See Tardif,* 57 M.J. at 224. We are further "required to determine what findings and sentence 'should be approved,' based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay." *Id.*

The crux of the appellant's assignment of error focuses on the delay after his case was docketed with this court

on 25 April 2002. Appellant's Brief and Assignments of Error of 30 Mar 2004 at 5. Although this delay was less than ideal, we do not find it unduly excessive or unreasonable. Furthermore, much of the delay in this case is attributable to eighteen enlargements of time requested by the appellant. Additionally, with the exception of a general statement by the appellate defense counsel in his Twelfth Motion for Enlargement of Time on 12 September 2003 that the "Appellant remains in confinement and desires to have his appeal filed as soon as possible," we find nothing in the record suggesting that the appellant had any real concerns about the delay in this case or with the quality of his appellate representation. Indeed, there is no evidence in the record of any prior complaints to the military judge, staff judge advocate, or convening authority regarding post-trial processing delays. We also see no indication of deliberate or malicious intent as a reason for the delay. *Toohey,* 60 M.J. at 708. While we do not condone the length of delay in this case, we do not find that it affects the "findings and sentence [that] 'should be approved,' based on all the facts and circumstances reflected in the record." *Tardiff,* 57 M.J. at 224. Therefore, we decline to grant relief.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

For the Court
R.H. TROIDL
Clerk of Court

Appendix Y

UNITED STATES, Appellee

v.

Troy B. JENKINS
Quartermaster Third Class (E-4), U.S. Navy

No. 03-0473/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200101151

September 11, 2006, Ordered

Counsel for Appellant: MAJ Jeffrey S. Stephens, USMC.

Counsel for Appellee: LT Mark H. Herrington, JAGC, USNR.

On consideration of the granted issue, in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in United States v. Moreno, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix Z

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

Charles Wm. DORMAN C.A. PRICE C.L. CARVER

UNITED STATES

v.

Troy B. JENKINS
Quartermaster Third Class (E-4), U.S. Navy

62 M.J. 582

NMCCA 200101151 Decided 15 November 2005

Sentence adjudged 29 November 2000. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silverdale, WA.

CHARLES W. GITTINS, Civilian Defense Counsel
LT B.L. MIZER, JAGC, USNR, Appellate Defense Counsel

LCDR THOMAS P. BELSKY, JAGC, USNR, Appellate Defense Counsel
LT COLIN A. KISOR, JAGC, USNR, Appellate Defense Counsel
LT ELYSIA G. NG, JAGC, USN, Appellate Defense Counsel
LT LARS C. JOHNSON, JAGC, USNR, Appellate Government Counsel
Capt GLEN R. HINES JR., USMC, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was tried by a general court-martial composed of a military judge sitting alone. Consistent with his pleas, the appellant was convicted of rape and forcible sodomy. Contrary to his pleas, the appellant was convicted of committing an indecent act by engaging in sodomy with the victim of the rape and forcible sodomy, while in the presence of another person. The appellant's crimes violated Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934. The adjudged and approved sentence consists of confinement for 12 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. Upon taking action, the convening authority granted clemency to the appellant by suspending confinement in excess of 9 years for a period of 5 years from the date of the action.

In an unpublished decision issued on 30 January 2003, we previously took corrective action in this case. In that

decision, this court dismissed the Article 134, UCMJ, offense, which alleged the commission of an indecent act. Additionally, the court reassessed the sentence, reducing the approved confinement by 6 months, but otherwise affirming the findings and the sentence as approved by the convening authority.

On 21 June 2004 our superior court set aside our decision because the text of our previous opinion included verbatim replication of substantial portions of the Government's Answer without attribution. After reviewing our decision, the court stated that it was "left in doubt that [the] [a]ppellant received the independent Article 66(c) review to which he was entitled." *United States v. Jenkins,* 60 M.J. 27, 29 (C.A.A.F. 2004). In spite of the fact that this court specifically stated that it had conducted our review in accordance with Articles 59(a) and 66(c), UCMJ, and had dismissed Charge III and its specification on a different legal theory than had been advanced by the appellant, our superior court concluded that it could not determine that the appellant had "received the 'awesome, plenary, and de novo' review to which he was entitled by law." *Id.* at 30 (citing *United States v. Duncan*, 38 M.J. 476, 479 (C.M.A. 1993)); *see also United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). As a result, the case was remanded to our court for "a new Article 66(c) review before a panel comprised of judges who have not previously participated in this case." *Jenkins*, 60 M.J. at 30.

The appellant initially raised five assignments of error.

The appellant challenged the providence of his guilty pleas to rape and forcible sodomy, claiming that the plea inquiry revealed the existence of the defense of mistake of fact and that the military judge failed to advise the appellant of this defense. The appellant also alleged that his guilty plea to rape is improvident because the plea inquiry did not establish the element of force and lack of consent. Additionally, the appellant alleged that he was deprived of the effective assistance of counsel, asserting that his trial defense counsel failed to investigate the circumstances surrounding his sworn statement given to investigators or a potential mistake of fact defense, and that his counsel failed to recognize that the appellant's comments during the providence inquiry gave rise to that defense. The appellant also argued that his conviction for forcible sodomy and indecent acts constituted an unreasonable multiplication of charges. Finally, the appellant alleged that his sentence is inappropriately severe.

Following receipt of the case from our superior court, we offered the appellant an opportunity to submit additional assignments of error. Accordingly, his counsel now asserts that the appellant has been denied his right to a speedy review of his conviction. The appellant also raised two issues pursuant to his right under *United States v. Grostefon*, 12 M.J. 431, 436 (C.M.A. 1982), namely a petition for a writ of habeas corpus, seeking his release from confinement and monetary compensation for each day he has been confined, and a petition for a new trial. These matters were filed on 23 and 24 September 2004, respectively. Additionally, we

specified an issue to counsel concerning the scope of review.

Finally, on 29 September 2005 the appellant filed a motion for leave to file another supplemental assignment of error. That motion is hereby granted. In this new assignment of error the appellant argues that his conviction should be set aside because the examiner who conducted the DNA analysis in his case subsequently confessed to falsifying test results in some cases. The Government was not required to file an answer to this assignment of error.

Knowing the process that this court uses to decide the cases that come before it, and trusting in the integrity and word of the judges who participated in the initial decision of this case, we have no doubt that this court reached its initial decision after full compliance with Article 66(c), UCMJ. Nevertheless, in compliance with the remand from our superior court, we have now afforded the appellant an entirely new review in accordance with our statutory mandate.

In conducting that review, we have carefully considered the record of trial, the appellant's initial and supplemental assignments of error, the appellant's brief concerning the specified issue, the appellant's issues raised pursuant to *Grostefon*, and the reply briefs filed by the appellant's counsel. We have also considered the briefs filed by the Government in response to the appellant's assignments of error and its brief concerning the specified issue. Finally, we considered the excellent oral arguments presented by Captain J.S. Stephens,

USMC, on the appellant's behalf, and Lieutenant M.H. Herrington, JAGC, USNR, on behalf of the Government. Following our consideration of all these matters, we conclude that the findings, as affirmed by our decision of 20 January 2003, and sentence, as modified herein, are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Facts

The victim of the appellant's crimes was Ms. D. Since several of the appellant's assignments of error assert that his guilty pleas are improvident, we will set forth a summary of the facts as related by the appellant during the providence inquiry.

On the evening of 4 August 2000, the appellant was out with Seaman (SN) Mark Metcalf. During the evening, the appellant consumed about five glasses of wine. After midnight, during the early morning hours of 5 August 2000, the appellant was driving back to SN Metcalf's apartment, located in military housing in Bremerton, Washington. While driving through the parking lot of a Denny's restaurant, the appellant saw Ms. D getting into a car. Although the appellant did not know Ms. D, he waved to her and shouted a greeting. Ms. D walked to the appellant's car and asked, "Can you get me out of here?" Record at 28. The appellant said that he could, and Ms. D got into the back seat of the car. SN Metcalf then joined her in the back seat. When Ms. D got into the car she began crying and was "very

distraught." *Id.* at 29. Ms. D asked the appellant to get her out of there, and to take her to a hotel or anywhere. Since the appellant was already on the way to SN Metcalf's apartment, he took her there. The appellant could not hear what SN Metcalf and Ms. D talked about as he drove to the apartment.

When they arrived at the apartment, around 0145, SN Metcalf and Ms. D went straight to the bedroom. The appellant went to the sofa in the living room. The appellant did not know why SN Metcalf and Ms. D went to the bedroom. When Ms. D came out of the bedroom, 15 minutes later, she was wearing a red tank top and a black leather jacket. She also had her pocketbook. The appellant heard Ms. D say, "I'm out of here. I'm leaving." *Id.* at 28. The appellant never heard the door open, but he did hear a fall.

Shortly after hearing a fall, he heard SN Metcalf ask him to come over. The appellant went into the hallway and saw that SN Metcalf was holding Ms. D down on the floor. She was in a seated position, with her back against the wall. SN Metcalf was kneeling in front of her and he had her pinned up against the wall. SN Metcalf then told the appellant to get some condoms out of his bedroom. The appellant got some condoms and put one on. When he came back into the hallway, SN Metcalf had Ms. D perform oral sex on the appellant. The appellant did not think that Ms. D wanted to perform oral sex.

[M]J: Did you think she wanted to

have oral sex with you or she didn't want to?
ACC: No, no, sir. She didn't want to.

MJ: Did she do something to let you know she didn't want to?
ACC: No, sir.

MJ: Was it because Metcalf was---

ACC: Yes, sir, because Metcalf forced her. He told her to do it. She was--I believe she was in fear of her life or she was--you know, she was traumatized, and she did it because Metcalf told her to do it.

MJ: So as far as you understood, if she had not done what Metcalf told her to do, she was afraid of what Metcalf would do to her?
ACC: Yes, sir.

Id. at 34-35.

Although the appellant did not know what SN Metcalf had done to Ms. D, the appellant did hear the fall and saw SN Metcalf holding her down, pinning her against the wall. Ms. D never gave any indication to the appellant that she wanted to have oral sex with him and they never discussed it. The appellant, however,

acknowledged that Ms. D did not consent to performing the oral sex.

> MJ: Now, did you think that this act of sodomy of oral sex was done by force?
> ACC: Yes, sir.
>
> MJ: And what force was that?
> ACC: Because she wanted to leave. Metcalf stopped her from leaving. He caused her to stop struggling. She was put in a compromising situation, and she did what he told her to do.
>
> MJ: She did it because he told her to, not because she wanted to?
> ACC: Yes, sir, because he told her to.

Id. at 37.

When the oral sex with the appellant was completed, SN Metcalf told Ms. D to go to the bedroom. SN Metcalf walked behind her, holding her elbows and pushing her into the bedroom. *Id.* at 38. The appellant heard SN Metcalf tell Ms. D to take her shirt off. He also heard a sound, like her head hitting the wall, and she started to moan. "[S]he said 'Ow' to indicate that she was in pain or she was hurt." *Id.* at 39. After it got quiet in the bedroom, the appellant walked into the bedroom. When

the appellant went into the bedroom, his penis was already erect and he was wearing a condom. As he entered the room, he saw SN Metcalf ejaculate onto Ms. D 's face. *Id.* at 41. SN Metcalf then told the appellant, "Okay. Go ahead." The appellant wiped the semen off of Ms. D's face and then engaged in sexual intercourse with her.

While the appellant was having sex with Ms. D, she was awake and she looked at the appellant. She did not make any noises or have any reaction. Ms. D did not give the appellant any indication that she wanted to have sex with him.

> MJ: So under the circumstances, why do you think she had sex with you?
>
> ACC: Because she was scared, sir, from all of what had happened. She tried to leave the apartment. Metcalf stopped her. He forced her to the ground. That was the indication right then and there that she wanted to leave the apartment.

Id. at 41-42. The appellant also acknowledged that although Ms. D did not resist the sexual intercourse it was because she knew that it would have been futile or would not work. It was for that reason that Ms. D had sex with the appellant.

Also while the appellant was having sex with Ms. D, she asked for water. Initially the appellant refused to get her any. When she persisted, the appellant left the bedroom to get her water. While he was gone from the room, Ms. D jumped out of the bedroom window, located on the second floor of the apartment complex. The appellant then heard the downstairs neighbors saying, "Call the ambulance. Call the police." *Id.* at 42.

Scope of Review

The Court of Appeals for the Armed Forces remanded this case to us "for a new Article 66(c) review. . . ." *Jenkins*, 60 M.J. at 30. Previously our superior court stated that "a Court of Criminal Appeals 'can only take action that conforms to the limitations and conditions prescribed by the remand.'" *United States v. Riley*, 55 M.J. 185, 188 (C.A.A.F. 2001)(quoting *United States v. Montesinos*, 28 M.J. 38, 44 (C.M.A. 1989)). In its remand in *United States v. Riley*, 50 M.J. 410, 416 (C.A.A.F. 1999), our superior court clearly demonstrated its ability to narrowly prescribe the scope of review upon remand. Since the remand from our superior court in this case was clear that we were to conduct a new review under Article 66(c), UCMJ, we must first determine the scope of that review. Accordingly, this court specified the following issue:

> THE NMCCA DECISION DATED 30 JANUARY 2003 HAVING BEEN SET ASIDE, MAY THIS COURT, DURING THE ARTICLE

66, UCMJ, REVIEW, AFFIRM ALL OF THE FINDINGS AND SENTENCE AS APPROVED BY THE CONVENING AUTHORITY?

N.M.CT.CRIM.APP. ORDER of 21 Mar 2005.

We answer the specified issue in the negative. Although we believe an affirmative answer is not constitutionally barred, the scope of our review is limited by the holding in *United States v. Crider*, 46 C.M.R. 108, 110 (C.M.A. 1973). In *Crider* our superior court concluded that the Navy Court of Military Review had erred when it reinstated Lance Corporal Crider's conviction for premeditated murder after a prior panel of the Navy court had only approved a conviction of unpremeditated murder. Our superior court concluded that, "an accused who obtains review here does not forgo the right to beneficial action taken on his behalf by the Court of Military Review when he secures reversal of that court's action." *Id.* This holding was recently reaffirmed in *United States v. Leak*, 61 M.J. 234, 244 (C.A.A.F. 2005), wherein the court quoted language from *Crider*, that "an accused cannot come to harm by appealing here and securing reversal of his conviction." *Id.* (quoting *Crider*, 46 C.M.R. at 110); *see Riley*, 55 M.J. at 188.[1]

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[1] An argument can be made that none of these three cases, *Crider*, *Leak*, or *Riley*, is controlling. In each of those cases, the Court of Military Review or the Court of Criminal Appeals had exercised its fact-finding powers under Article

Finding that we are bound by the holding in *Crider,* we will consider that portion of the earlier decision of this court, setting aside the findings of guilty to Charge III and its specification, to be the law of the case. Solely because the earlier decision set aside that charge and specification, so too shall we.

Providence of the Appellant's Guilty Pleas

The appellant challenges the providence of his guilty pleas on several grounds. First he argues that his statements to the military judge during the providence inquiry raised a mistake of fact defense and that the military judge failed to address this defense. Appellant's Brief of 11 Jun 2002 at 5-12. He also attacks the providence of his guilty plea to rape, alleging that the military judge's inquiry into the factual basis for the plea does not establish that the sexual intercourse was committed by force and without Ms. D's consent. Appellant's Brief at 16-18.

A military judge may not accept a guilty plea to an offense without inquiring into its factual basis. Art. 45(a), UCMJ; *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). Before accepting a guilty plea, the

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66(c), UCMJ, to initially grant relief to the appellant. In the case before us, the predecessor panel of this court granted relief on a question of law, finding the charge and specification it dismissed to be a lesser included offense of a charge and specification it affirmed.

military judge must ordinarily explain the elements of the offense, and must ensure that a factual basis for the plea exists. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002); *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980); RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Discussion. Acceptance of a guilty plea requires an appellant to substantiate the facts that objectively support the guilty plea. *United States v. Schwabauer*, 37 M.J. 338, 341 (C.M.A. 1993); R.C.M. 910(e).

> The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law or fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty. The only exception to the general rule of waiver arises when an error prejudicial to the substantial rights of the appellant occurs. R.C.M. 910(j); Art. 59(a), UCMJ.

United States v. Dawson, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999).

Based upon his guilty pleas, the appellant was convicted of rape and forcible sodomy. Prior to discussing the

factual basis for the appellant's pleas with him, the military judge advised the appellant of the elements of these two offenses. Record at 16, 19. In addition the military judge tailored the elements to the language of the specifications, and he also provided the appellant with relevant definitions. The appellant apparently understood the definitions and the elements.

The appellant now points to various statements he made on the record that he argues give rise to a mistake of fact defense. He does not, however, assert that he engaged in oral sodomy and sexual intercourse with Ms. D believing that she consented to those sexual activities with him. The appellant also ignores the requirement that for a mistake of fact defense to exist, with respect to the crimes for which he stands convicted, the mistake of fact would need to be both honest and reasonable. *United States v. Hibbard*, 58 M.J. 71, 72 (C.A.A.F. 2003). We hold that a review of the facts clearly results in the conclusion that, even if the appellant believed that Ms. D had willingly engaged in sexual activity with him, the belief would not have been reasonable. Ms. D had never met the appellant prior to the evening the offense occurred. She performed fellatio upon the appellant while SN Metcalf had her pinned to a wall and after SN Metcalf directed her to perform the sexual act. The sexual intercourse with the appellant occurred immediately after SN Metcalf had engaged in sexual activity with her and ejaculated onto her face, and after SN Metcalf then told the appellant, "Okay. Go ahead." Record at 41.

The appellant also asserts that the providence inquiry does not establish a factual basis for concluding that the sexual intercourse between the appellant and Ms. D involved force and a lack of consent. While we agree that the record does not establish actual force, it is abundantly clear that it does establish constructive force. Constructive force is sufficient. *Leak*, 61 M.J. at 246; *United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003). As the facts set forth above reveal, the appellant informed the military judge that although Ms. D did not resist the sexual intercourse, it was because she was scared and knew it was futile to do so. Record at 41-42, 44. With respect to both of the appellant's assignments of error concerning the providence of his pleas, we note that the military judge specifically addressed the issue of mistake of fact with the trial defense counsel, and counsel informed the military judge that the defense was fully explored and that it was not a legal defense to the charges. *Id.* at 44-45.

Applying the appropriate standards of review, set out above, we do not find a substantial basis in law or fact to question the appellant's guilty pleas to rape and sodomy. Rather, what is exhibited in this record and in the appellant's assignments of error are the appellant's attempts to rationalize and minimize his criminal misconduct.[2] Such rationalization and minimization,

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[2] For example, the appellant seeks to compare his case to *United States v Adams*, 33 M.J. 300 (C.M.A. 1991). No reasonable comparison can be made between the two cases. Adams was convicted of carnal knowledge of his niece. At

however, does not invalidate an otherwise legally sufficient guilty plea. *See United States v. Penister*, 25 M.J. 148, 153 (C.M.A. 1987)(Cox, J. concurring). Accordingly, we hold that the appellant's guilty pleas are provident.[3]

Effective Assistance of Counsel

The appellant's second assignment of error is framed by his affidavit submitted to this court, as well as allegations contained in his later *Grostefon* submissions. The essence of the appellant's argument is that his counsel failed to investigate the appellant's sworn statement made to the Naval Criminal Investigative Service. He claims that, had his counsel done so, she would have recognized that the appellant potentially had

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the time of the offense, Adams was in his own bed, and in a state of semi-awareness, when his niece got in bed with him and initiated sexual relations with him. Adams told the military judge, who accepted his guilty plea, that when he began having sex with his niece he thought she was his wife. The Court of Military Appeals found that Adams' plea was not provident because he raised an unresolved issue concerning the identity of the victim.

[3] Contrary to the earlier decision of this court in this case, we did not consider the testimony of Ms. D in concluding that the appellant's guilty pleas are provident. We did consider her testimony and the remainder of the record to determine if either her testimony or other evidence of record raised matters inconsistent with the appellant's guilty pleas, as well as on the issue of sentence appropriateness.

a defense of mistake of fact. He also alleges that his counsel failed to recognize that his statements during the providence inquiry gave rise to the same defense. The appellant also inferentially challenges the advice his counsel provided him, to plead guilty even without a pretrial agreement "in an effort to obtain leniency from the military judge." Appellant's Brief at 16.

In reviewing allegations of ineffective assistance of counsel we conduct a *de novo* review. *United States v. McClain*, 50 M.J. 483, 487 (C.A.A.F. 1999)(citing *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997)). In conducting that review, we are bound to adhere to the standards set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland* the Supreme Court declared that:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

> Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. Additionally, the Supreme Court reasoned that:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Id. at 689. In *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987), our immediate superior court made clear that these same standards are equally applicable before military courts.

Accordingly, military appellate courts have routinely applied these standards. In order to show ineffective assistance of counsel, "an appellant 'must surmount a very high hurdle.'" *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). When viewing tactical decisions by counsel, the test is whether such tactics were unreasonable under prevailing professional

norms. *See United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001)(citing *Strickland*, 466 U.S. at 688-90); *United States v. Babbitt*, 26 M.J. 157, 158 (C.M.A. 1988)(citing *United States v. Cronic*, 466 U.S. 648 (1984)); *Scott*, 24 M.J. at 188 (citing *Cronic*, 466 U.S. at 648). We will not second-guess those tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993)(quoting *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)); *United States v. Clark*, 55 M.J. 555, 560 (Army Ct.Crim.App. 2001), *aff'd*, 56 M.J. 203 (C.A.A.F. 2001).

In reviewing claims of ineffective assistance of counsel, it is strongly presumed that counsel are competent in the performance of their representational duties. *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004); *Anderson*, 55 M.J. at 201; *Scott*, 24 M.J. at 188. To rebut the presumption of competence of counsel, the appellant is required to point to specific errors committed by his counsel that were unreasonable under prevailing professional norms. *Scott*, 24 M.J. at 188 (citing *Cronic*, 466 U.S. at 648). "Acts or omissions that fall within a broad range of reasonable approaches[, however,] do not constitute a deficiency." *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001). Further, the appellant must establish a factual foundation for a claim that his counsel's representation was ineffective. *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000). An appellant's "[s]weeping, generalized accusations will not suffice." *Id.* (citing *Moulton*, 47 M.J. at 229).

Our superior court has also held that "[c]ounsel have a duty to perform a reasonable investigation or make a determination that an avenue of investigation is unnecessary." *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002)(citing *United States v. Brownfield*, 52 M.J. 40, 42 (C.A.A.F. 1999)). Further, "'[w]e do not look at the success of a . . . trial theory, but rather whether [trial defense] counsel made an objectively reasonable choice in strategy from the alternatives available at the time.'" *Dewrell*, 55 M.J. at 136 (quoting *United States v. Hughes*, 48 M.J. 700, 718 (A.F.Ct.Crim.App. 1998)).

This court need not reach the question of deficient representation if we can first determine a lack of prejudice. *Quick*, 59 M.J. at 386; *United States v. Adams*, 59 M.J. 367, 371 (C.A.A.F. 2004)(quoting *Strickland*, 466 U.S. at 697). In order to constitute prejudicial error, the appellant's trial defense counsel's deficient performance must render the result of the proceeding "unreliable" or "fundamentally unfair." *See United States v. Ingham*, 42 M.J. 218, 223 (C.A.A.F. 1995)(quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)).

We now apply those standards to the case before us. First, it is not clear whether the appellant is suggesting that his statements could have been suppressed had his counsel investigated the circumstances surrounding the appellant's interrogation by the Naval Criminal Investigative Service. Furthermore, he has not asserted any facts that suggest the statement was involuntary or

obtained in violation of his constitutional or statutory rights. For an appellant to prevail on an allegation of ineffective assistance of counsel premised upon counsel's failure to move to suppress evidence, the appellant "'must show that there is a reasonable probability that such a motion would have been meritorious.'" *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)(quoting *United States v. Napoleon*, 46 M.J. 279, 284 (C.A.A.F. 1997). The appellant has not made such a showing.

Second, the essence of the appellant's argument is that, had his attorney investigated his statement, "she would have ultimately discovered that Appellant did not know of SN Metcalf's behavior towards [Ms. D] until after his encounter with [Ms. D]. Appellant learned of SN Metcalf's behavior only when he read the results of [Ms. D]'s statement indicating that SN Metcalf punched her in the stomach and forced her to the ground." Appellant's Brief at 14 (internal citations omitted.) The appellant then concludes that, because his counsel failed to investigate the statement, she did not realize that he had a mistake of fact defense. He also claims that his counsel failed to recognize the defense during the providence inquiry itself.

There are several significant flaws in the appellant's argument. To begin, the appellant ignores the law, that for a mistake of fact defense to apply to the charges of rape and sodomy, both general intent offenses, the mistake of fact would need to be both honest and reasonable. *Hibbard*, 58 M.J. at 72; R.C.M. 916(j). We

have already held that this defense was not raised during the providence inquiry. In considering his allegation that he was denied effective assistance of counsel, we have also examined the appellant's statement given to investigators, Prosecution Exhibit 2. The content of that statement is even more damaging to the appellant's position, and clearly does not lend support to a mistake of fact defense. If anything, it supports the conclusion that, even if the appellant believed Ms. D had not been forced into the sexual offenses to which the appellant pled guilty, or that she consented to them, the basis for that belief could not have been reasonable. Finally, we note that the record refutes the appellant's allegations that his counsel had failed to investigate the possibility of this defense.

> MJ: Lieutenant [M], I need to ask you if you had a sufficient opportunity to inquire into all the potential defenses of lack of manifestation of resistance or mistake of fact here?
> DC: Yes, sir.
>
> MJ: Okay. I realize that Petty Officer Jenkins is doing his best to be completely honest with me, and I just want to make sure that you had all the chance you have to—
> DC: We've explored it thoroughly, sir.
>
> MJ: Okay. And you're convinced that it's within the interest of justice for him to

> enter a guilty plea on this kind of case?
> DC: Yes, sir. I don't see that he has a legal defense.

Record at 44-45.

Additionally, it is equally clear that the appellant's counsel explored the possibility of a pretrial agreement. The appellant acknowledged that his counsel informed him that the convening authority would not agree to a pretrial agreement limiting confinement to less than 25 years. Appellant's Affidavit of 6 Jun 2002 at 2. We also note that in a letter to the convening authority the appellant references the pretrial negotiations and a comment by his trial defense counsel concerning "constructive force." Appellant's Letter to Convening Authority of 8 Jun 2001, Enclosures. We will not second-guess her advice to the appellant to forgo a 25-year "deal" and seek leniency from the trial judge, particularly where the adjudged sentence was less than half of what the convening authority had in mind.

Accordingly, following a *de novo* review of the issues, we conclude that the appellant has failed to meet his burden of demonstrating that he was deprived of effective legal counsel. We reject the appellant's sweeping, generalized allegations of ineffectiveness and find no merit in his argument that his counsel failed to recognize an available defense, primarily because we hold that the record does not give rise to such a defense. Finding no deficient performance, we are confident that the appellant was provided with competent and effective

assistance of counsel. Upon review, we are left with no question concerning the fairness and reliability of the results of the appellant's criminal trial.

Impact of a Questionable DNA Analysis

In a supplemental assignment of error, the appellant seeks to have the findings and sentence set aside, and asks this court to authorize a rehearing. The basis for this assignment of error is the disclosure by the Government that the examiner who conducted DNA tests in the appellant's case has admitted to making a false entry in a test conducted in an earlier case. The same examiner was suspended for permitting sample contamination during DNA testing in 2004. As of May 2005, the examiner had been suspended from DNA case work. Based upon this disclosure, the appellant argues that, "[b]ecause the examiner that tested the DNA samples in Appellant's case has been deemed incompetent by the United States Army, and has admitted to fraudulently reporting false results, this Court cannot affirm Appellant's conviction." Appellant's Supplemental Brief of 29 Sep 2005 at 2. The appellant argues, "[T]he fact that the [G]overnment possessed DNA evidence that positively identified Appellant as having had intercourse with the alleged victim . . . certainly impacted Appellant's decision to plead guilty if it was not entirely responsible for it." *Id.* at 3.

We find this argument disingenuous. The appellant entered his guilty pleas on 29 November 2000. Two documents before us, both provided by the appellant,

indicate that the results of the DNA testing concerning the appellant were not complete until either 12 or 13 December 2000. The listing of cases in which DNA testing was performed by the suspended examiner, attached as Appendix B to the Appellant's Supplemental Brief of 29 September 2005, lists a "comp" date of "12/12/2000" for the DNA testing performed in the appellant's case. An investigation report attached to the appellant's *Grostefon* filing of 23 September 2004 states that the Army Criminal Investigation Laboratory reported the appellant's DNA test results to the Naval Criminal Investigative Service on 13 December 2000. Also attached to that filing is a document indicating that the testing had been conducted by 28 November 2000. We have no evidence the appellant was aware of the results when he plead guilty, one day later.

We further note that the appellant confessed to his involvement with Ms. D on 6 August 2000, long before any DNA testing was conducted. That confession was far more incriminating than the results of the DNA testing, results that were not even released until after the appellant pleaded guilty. Those results, which only show that the appellant's semen was found in a condom, are not surprising. The appellant had admitted to wearing a condom, and to ejaculating into it while Ms. D performed fellatio on him. Prosecution Exhibit 2.

The appellant seeks a new trial based upon newly discovered evidence, that being the misconduct of the lab technician who examined the appellant's DNA samples. We deny the appellant's request for the

following reasons:

1. The appellant has not demonstrated any link between the DNA testing and his decision to plead guilty. Other evidence we have before this court, evidence filed by the appellant himself, proves that the results of the DNA testing could not have had any impact on the appellant's decision to plead guilty.

2. R.C.M. 1210(f)(2) provides that "[a] new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that . . . [t]he newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused." The appellant has failed to make that showing. Furthermore, the appellant's conviction was not secured by the results of the DNA testing. There is no evidence that the results concerning testing done relative to the appellant are inaccurate. In fact, the appellant admitted in his 6 August 2000 statement that he had ejaculated into a condom and then discarded it at the apartment. Finally, if the appellant had pleaded not guilty, the limited DNA evidence pales by comparison to the other evidence of the appellant's guilt that was available to the Government in this case.

Accordingly, having considered this supplemental assignment of error, we decline to grant relief.

Sentence Appropriateness

The appellant argues that a sentence including 12 years confinement and a dishonorable discharge is inappropriately severe. He forwards two arguments to support his position. First, he notes that SN Metcalf received only 4 months confinement and a bad-conduct discharge for his related crimes. Second, he argues that his "actions were . . . more the result of bad judgment and a failure to realize a 'questionable situation' than the act of a sexual predator[,]", and that he did not "threaten or intimidate" Ms. D. Appellant's Brief at 19 (quoting record at 44, 171).

In *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999), the Court of Appeals for the Armed Forces set forth a three-prong test for evaluating claims of sentence disparity: first, determine how closely related the cases are; second, evaluate whether the sentences are in fact, highly disparate; and, finally, identify whether any rational basis exists for the disparity.

We agree with the appellant that the cases are closely related. We also agree that the sentences received by the appellant and SN Metcalf are highly disparate. The appellant, however, does not even attempt to analyze the disparity. Although both cases stem from the same factual setting, the results of trial significantly differ. In his recommendation to the convening authority concerning the action to take in the appellant's court-martial, the staff judge advocate advised the convening authority about the results of SN Metcalf's case. He

wrote:

> This is a companion case to Seaman Mark O. Metcalf, . . . tried by a General Court-martial . . . Seaman Metcalf's court-martial forum was members with enlisted representation. Seaman Metcalf plead guilty to a violation of Article 125 (consensual sodomy). . . , but not guilty to the remaining charges and specifications. SN Metcalf was found guilty of violations of the UCMJ, Article 125 (consensual sodomy) and Article 134 (adultery). Sentence adjudged: to be reprimanded, to be reduced to pay grade E-1; to be confined for 120 days; and to be discharged from the service with a bad[-]conduct discharge.

Staff Judge Advocate's Recommendation of 20 Apr 2001 at 3.

When considering SN Metcalf's results of trial, it is readily apparent why there is a disparity in the sentences between the two cases. The fact that the appellant was convicted of far more serious misconduct than was SN Metcalf is a sufficient rational basis for the disparity. Based upon the offenses of which he was convicted, SN Metcalf faced a possibility of dishonorable discharge and 6 years confinement. The appellant faced a possible sentence of a dishonorable discharge and confinement for life without eligibility for parole. *See Lacy*, 50 M.J.

at 289 (noting that it is appropriate to consider the disparity in relation to the potential maximum punishment).

Accordingly, we find the appellant's claim that his sentence is inappropriately severe, due to its disparity with the sentence of SN Metcalf, to be unpersuasive. Based on the entire record, including the impact of the appellant's crimes on the victim,[4] the appellant's evidence presented in extenuation and mitigation and the appellant's unsworn statement, we further find that the appellant's sentence is not inappropriately severe for this offender and these offenses. Art. 66(c), UCMJ; *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

Accordingly, we decline to grant relief.

Post-Trial Delay

In a supplemental assignment of error filed on 14 January 2005, the appellant asserts that he has been denied his right to timely appellate review of his case. The appellant has not requested specific relief. He does, however, allege prejudice. First, he argues that if a rehearing is authorized in his case, the passage of time

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[4] Ms. D was seriously injured when she jumped, nude, through the screen window from the bedroom where the appellant had just raped her and fell 14 feet to the ground. Ms. D was medivaced from the scene by helicopter.

alone will have prejudiced his ability to present a defense or favorable evidence. We find that argument speculative in nature. Second, he argues that the delay in his case will result in his losing the clemency granted to him by the convening authority.

In fact, when the convening authority suspended confinement in excess of 9 years, he conditioned the suspension upon the appellant's "successful completion of the Violent Offender Program at the Naval Consolidated Brig . . . ." Convening Authority's Action of 15 Jun 2001 at 2. The appellant asserts that the Commanding Officer of the Brig intends to recommend that the suspension be revoked. Further, the appellant asserts that a vacation hearing was held on 20 December 2004, and that the hearing officer informed him that she was recommending the vacation of the suspended sentence because he had been dropped from the Violent Offender Program for being disruptive. At oral argument, neither the Government counsel nor the appellant's counsel could inform this court of the status of the vacation proceedings. Nevertheless, even if the suspended sentence was vacated, our action with respect to the approved sentence moots the appellant's second argument concerning prejudice.

A chronology of relevant dates will assist an understanding of the post trial delay issue.

Date	Action	Date Elapsed Between Events	Total Days Since Date of Trial
29 Nov 00	Date of Trial	0	0
28 Jun 01	Case Received at NAMARA	211	211
11 Jun 02	Appellant's Brief Filed	348	559
22 Nov 02	Government's Answer Filed	164	723
30 Jan 03	NMCCA Decision Issued	69	792
31 Oct 03	Petition Granted at CAAF	274	1066
21 Jun 04	CAAF Decision Issued	234	1300
25 Aug 04	CAAF Mandate Issued	65	1365
10 Sep 04	Case Re-docketed at NMCCA	16	1381
23 Sep 04	Supplemental Assignment of Error Filed	13	1394
05 Oct 04	NMCCA Grants Stay	12	1406
10 Jan 05	NMCCA Lifts Stay	97	1503
14 Jan 05	Supplemental Assignment of Error Filed	4	1507

08 Mar 05	Government's Answer Filed	53	1560
14 Mar 05	Appellant's Motion for Oral Argument Filed	6	1566
13 Jul 05	Oral Argument at NMCCA	121	1687
29 Sep 05	Supplemental Assignment of Error Filed	78	1765
15 Nov 05	NMCCA Decision Issued	46	1811

We consider four factors in determining whether post-trial delay violates the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 61 M.J. 100, 102 (C.A.A.F. 2005); *see also Barker v. Wingo,* 407 U.S. 514, 530 (1972)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id.* (quoting *Toohey*, 60 M.J. at 102).

Here, the appellant's focus is on the entire period of delay. As we examine each step in the appellate process, we find no individual step to have been facially

unreasonable. Furthermore, given the appellate history itself, we do not find the total delay to this point to have been facially unreasonable.

Assuming *arguendo* that the delay was facially unreasonable, we find no due process violation. First, the appellate record itself provides the explanation for the delay in this case. Second, the appellant did not assert a demand for timely appellate review until 14 January 2005. We do note that on 1 October 2004 the appellant filed an opposition to the Government's motion to stay the proceedings. But then, after the Government filed its answer in March 2005, the appellant moved for oral argument. The Government opposed that motion. Second, as explained above, we have no evidence of actual prejudice attributable to the delay. Thus we conclude that there has been no due process violation due to post-trial delay.

We are also aware of our authority to grant relief under Article 66, UCMJ, but we decline to do so. *United States v. Oestmann*, 61 M.J. 103,10 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 100; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). In *Tardif* our superior court made clear that this court could grant relief without a showing of actual prejudice in those cases where there has been excessive post-trial delay. The court said that we could grant relief "if [we] deem[ed] relief appropriate under the circumstances." *Tardif*, 57 M.J. at 224. The court also made clear that we are required to consider unexplained and

unreasonable post-trial delay in determining "what findings and sentence 'should be approved.'" *Id.* What is equally clear from *Tardif* is that while we are required to consider unexplained and unreasonable post-trial delay in determining what findings and sentence should be approved, whether we grant relief and, if granted, the nature of that relief, is a matter left to the discretion of this court.

We do not condone excessive delay. While we do not find such delay in this case, we recognize that the case could have been processed more quickly at virtually every step of the chronology detailed above. That is not the standard, however, and we will not grant a windfall to the appellant. *United States v. Diaz*, 61 M.J. 594, 613 (N.M.Ct.Crim.App. 2005), *rev. granted*, No. 05-0500; 2005 CAAF LEXIS 1238 (C.A.A.F. Oct. 27, 2005).

Conclusion

Because we are bound by the relief afforded the appellant by the decision of a different panel of this court on 30 January 2003, we set aside the appellant's conviction of Charge II and its specification. That charge and specification are dismissed. Consequently, the remaining assignment of error concerning an allegation of unreasonable multiplication of charges is moot. Additionally, the appellant's petition for a writ of habeas corpus is denied.

As a result of our action on the findings, we have

reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Upon reassessment of the sentence, we approve only so much of the sentence as extends to confinement for 9 years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. We have afforded more relief to the appellant than was afforded by the earlier decision of this court because there is no indication in the record that the military judge considered the offense we have dismissed to have been multiplicious for sentencing purposes with the remaining offenses. A supplemental promulgating order, reflecting the findings and sentence as modified by this decision, shall be issued.

Senior Judge CARVER and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix AA

UNITED STATES, Appellee
v.

Damon G. JOHNSON II
Corporal (E-4), U.S. Marine Corps

No. 05-0634/MC

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200200401

September 11, 2006, Ordered

Counsel for Appellant: LT Brian L. Mizer, JAGC, USNR.

Counsel for Appellee: MAJ Kevin C. Harris, USMC.

On consideration of the granted issue in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in *United States v. Moreno*, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix BB

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

W.L. RITTER C.L. SCOVEL M.J. SUSZAN

UNITED STATES

v.

Damon G. JOHNSON II
Corporal (E-4), U.S. Marine Corps

NMCCA 200200401 Decided 31 May 2005

Sentence adjudged 19 April 2000. Military Judge: C.H. Wesely.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.

LCDR THOMAS BELSKY, JAGC, USNR, Appellate Defense Counsel
LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel

LT JASON LIEN, JAGC, USNR, Appellate Government Counsel
LT LARS C. JOHNSON, JAGC, USNR, Appellate Government Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of possession of marijuana with intent to distribute, transferring counterfeit U.S. currency, and conspiracy to commit both offenses, in violation of Articles 81, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 912a, and 934. The appellant was sentenced to confinement for 6 years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged, but suspended all confinement in excess of 60 months pursuant to a pretrial agreement.

This is the second time this case is before us for review. On 12 December 2003, we set aside the CA's action to afford the appellant the opportunity to request clemency from the CA. The record of trial was returned to the Judge Advocate General for remand to the CA for completion of a new staff judge advocate's recommendation (SJAR) and action within 90 days.

United States v. Johnson, No. 200200401, unpublished op. (N.M.Ct.Crim.App. 12 Dec 2003)(*Johnson I*). On 22 November 2004, the appellant moved to dismiss the charges and specifications for lack of speedy post-trial review. On 14 February 2005 (after two intervening Government motions for enlargement of time were granted over opposition from the appellant), the Government filed a response to this court's order of 2 December 2004 to show cause why the appellant's motion should not be granted, and moved to attach the CA's new action of 11 February 2005. The appellant filed a reply to the Government's response on 17 February 2005, and again sought dismissal. On 28 February 2005, we denied the appellant's motion without prejudice to raise the issue during direct review. The new CA's action approved only so much of the sentence as provided for a bad-conduct discharge, confinement for 54 months, and reduction to pay grade E-1.

We have carefully examined the record of trial, the appellant's sole remaining assignment of error, and the Government's answer. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the appellant's substantial rights was committed. Arts. 59(a) and 66(c), UCMJ.

In his sole assignment of error the appellant requests that all charges and specifications be dismissed, or in the alternative, that his bad-conduct discharge be disapproved because he was denied a speedy review of his court-martial conviction. We consider four factors in

determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* __ M.J. __, No. 02-0060 (C.A.A.F. May 10, 2005)(citing *Barker v. Wingo,* 407 U.S. 514, 530 (1972)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Jones*, slip op. at 8. Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.* at 9.

The appellant alleges timeliness from date of sentencing is at issue. Appellant's Brief of 31 Mar 2005 at 4. We disagree. This court granted the appellant's requested relief on initial review of his case. (*Johnson I*). Given that action, we view the timeliness issue to involve the period after our 12 December 2003 decision. We find a delay of over 400 days during this period of time to be facially unreasonable, triggering a due process review.

We next look to the reason for the delay and note that it is not totally unexplained. The Government offers operational commitments of Operation Enduring Freedom and Operation Iraqi Freedom, resulting in deployment of the CA, transfer of general courts-martial convening authority to a new CA, reduced manpower and increased volume of courts-martial records pending review with the new CA, as a partial explanation for

delay. With this in mind we do not find the delay so extreme as to warrant a presumption of prejudice.

However, the Government's explanation includes the concession that failure to comply with this court's order was without excuse. Government Answer of 2 May 2005 at 4. In view of the Government's negligence in this regard, we look to the third and fourth factors. The appellant did assert his right to a timely appeal; however, we must note that the assertion was not made until almost a year after the appellant's case was remanded for a new action. Appellant's Motion to dismiss of 22 November 2004. After the appellant's assertion a new SJAR was completed and the new CA's action was taken on 11 February 2005.

Under the fourth factor we review the case for prejudice. While the appellant asserts prejudice resulted, we do not find any evidence of prejudice. The appellant avers that the new CA's action was prejudicial because it disapproved 6 months confinement that he had already served. We do not agree with the appellant's rationale that by granting relief the CA turned an otherwise legal sentence into wrongful and oppressive incarceration. *See United States v. Ridgeway,* 48 M.J. 905, 907 (Army Ct.Crim.App. 1998)(finding disapproval of confinement already served can provide "meaningful relief"). Likewise we are not persuaded that the appellant's lack of eligibility to appear before the parole board constituted the requisite prejudice. *See United States v. Powis,* 12 M.J. 691, 694 (N.M.C.M.R. 1981). Thus, we conclude that there has been no due process violation

due to the post-trial delay. Finally, we do not condone the Government's unexcused failure to comply with this court's order. Nevertheless, we find no reason to invoke the remedy of dismissal in a case where no prejudice to the appellant has occurred. Art. 59(a), UCMJ. We are also aware of our authority to grant relief under Article 66(c), UCMJ, but we decline to do so. *Jones,* slip op. at 17; *United States v. Oestmann,* __ M.J. __, No. 04-0723 (C.A.A.F. May 10, 2005); *United States v. Toohey*, 60 M.J. 100 (C.A.A.F. 2004); *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Conclusion

Accordingly, we affirm the findings and sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court

Appendix CC

UNITED STATES, Appellee

v.

Joseph R. KAMELY
Fireman (E-3), U. S. Navy

No. 06-0417/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200201248

September 11, 2006, Ordered

Counsel for Appellant: LT Brian L. Mizer, JAGC, USNR.

Counsel for Appellee: LT Craig A. Poulson, JAGC, USNR.

On consideration of the granted issue in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in *United States v. Moreno*, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix DD

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. SCOVEL J.F. FELTHAM J.D. HARTY

UNITED STATES

v.

Joseph R. KAMELY
Fireman (E-3), U. S. Navy

NMCCA 200201248 Decided 13 January 2006

Sentence adjudged 5 December 2001. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silverdale, WA.

LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel
CDR CHARLES N. PURNELL, JAGC, USN, Appellate Government Counsel
CAPT FREDERIC MATTHEWS, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant, who entered mixed pleas, of attempted wrongful distribution of methamphetamine, conspiracy to distribute methamphetamine (two specifications), conspiracy to distribute 3,4-methylenedioxymethamphetamine (MDMA or "ecstasy") (two specifications), negligent dereliction of duty, wrongful distribution of methamphetamine (three specifications), wrongful distribution of ecstasy (two specifications), wrongful possession of methamphetamine, wrongful use of methamphetamine (two specifications), and breaking restriction, in violation of Articles 80, 81, 92, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 892, 912a, and 934. The military judge sentenced the appellant to confinement for 30 months and a dishonorable discharge. The convening authority approved the adjudged sentence.

The appellant asserts three assignments of error, contending that the evidence is factually insufficient to prove that he twice conspired to distribute methamphetamine and that he attempted to distribute methamphetamine.

We have considered the record of trial, the appellant's three assignments of error, and the Government's

response. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Sufficiency of the Evidence

This court has an independent statutory obligation to review each case *de novo* for legal and factual sufficiency, and may substitute its own judgment for that of the trial court. Art. 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)(citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of this court are themselves convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41; *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. In exercising the duty imposed by this "awesome, plenary, *de novo* power," *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990), this court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge or court-martial members. Art. 66(c), UCMJ. Further, we may believe one part of a witness' testimony and yet disbelieve

another. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979); *see* Art. 66(c), UCMJ.

1. The Conspiracy Offenses

The appellant asserts that the evidence is factually insufficient to prove that he conspired twice with "Brian," a civilian, to distribute methamphetamine, first in February 2001 and then in March 2001. Specifically, he notes that Specifications 1 and 2 under Additional Charge I each allege a single overt act committed in order to effect a conspiracy between the appellant and Brian to distribute methamphetamine: that Brian distributed methamphetamine to Dentalman (DN) "C." He points out that DN C testified that the appellant, not Brian, provided the drug to him on those occasions. In addition, the appellant pled guilty to two specifications charging him with wrongfully distributing methamphetamine in February 2001 and March 2001.

In order to convict the appellant of the offense of conspiracy, the Government was required to prove that (1) the appellant entered into an agreement with one or more persons to commit an offense under the UCMJ; and (2) while the agreement continued to exist, and while the appellant remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 5b. The agreement need not be in any particular form or manifested in any formal words; it is sufficient if the

minds of the parties arrive at a common understanding to accomplish the object of the conspiracy. *Id.* at Part IV, ¶ 5c(2). Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. Any overt act is enough, as long as it is a manifestation that the agreement is being executed. *Id.* at Part IV, ¶ 5c(4)(b).

The appellant does not assert that agreements between Brian and himself to distribute methamphetamine did not exist. Instead, he focuses on the overt act alleged in each specification: distribution of methamphetamine by Brian to DN C. The appellant contends that a fatal variance existed between the overt act alleged in the specification and the only evidence admitted to prove it. That evidence was DN C's testimony that the appellant, not Brian, provided the drug to him. (The military judge did not consider, and neither do we, that part of the appellant's statement to criminal investigators that addressed the overt act, because it was uncorroborated. Record at 228.)

We are guided in our analysis by the decisions of our superior court in two key cases. In both, the court made clear that the requirement for proof of an overt act served the underlying purpose of substantiating the continued existence of the agreement itself, and that the Government was not restricted to proving only the overt acts alleged in the specification. When "substantial similarity" exists between the overt act alleged in the specification and the evidence of the overt act adduced at trial, the conspiracy is shown to be alive and in

operation. *United States v. Collier*, 14 M.J. 377, 377-78 (C.M.A. 1983)(citing *Strauss v. United States*, 311 F.2d 926, 932 (5th Cir. 1963), *cert. denied*, 373 U.S. 910 (1963)). In *United States v. Moreno*, 46 M.J. 216 (C.A.A.F. 1997), a case in which the Government amended the conspiracy specification on the day before trial by substituting a different overt act for the act originally alleged, our superior court cast the issue in terms of notice to the accused. It noted that the specification as originally drafted stated an offense, and none of the several overt acts that could have been alleged changed the basic agreement between the co-conspirators. It concluded that when the basic facts remain unchanged, other overt acts may be substituted or amended, and the accused may seek a continuance, if necessary. *Moreno*, 46 M.J. at 219.

In this case, the evidence showed that the appellant and Brian entered into agreements in February 2001 and March 2001 to distribute methamphetamine. We find that substantial similarity exists between the overt act alleged in each specification (distribution of methamphetamine by Brian) and that proven at trial (distribution by the appellant). The underlying purpose of the requirement that an overt act be proved—to establish that the conspiracy was alive and in operation—was satisfied. The appellant did not request a continuance when this variance in proof became apparent, and we conclude that he was not confused or surprised by it.

We find that a rational trier of fact could have found the

elements of the crime of conspiracy alleged in each of these two specifications proven beyond a reasonable doubt. We ourselves are convinced beyond a reasonable doubt of the appellant's guilt. These assignments of error are without merit.

2. Attempted Distribution of Methamphetamine

The appellant asserts that the evidence is factually insufficient to prove that he attempted to distribute methamphetamine on 3 July 2001, as alleged in the specification under Additional Charge V. Laboratory analysis revealed that the substance distributed by the appellant was caffeine, not methamphetamine. While acknowledging that he could be convicted of attempted distribution of methamphetamine if he believed the package contained that drug at the time of the transaction, he contends that the evidence fails to establish that belief on his part. He points to the fact that the color of the substance distributed was different than that of methamphetamine, and that as an experienced, once-a-day methamphetamine user, he had to have known that he was not distributing methamphetamine.

In order to convict the appellant of the offense of attempted distribution of methamphetamine, the Government was required to prove that (1) the appellant did a certain overt act; (2) the overt act was done with the specific intent to commit a certain offense under the UCMJ; (3) the act amounted to more than mere preparation; and (4) the act apparently tended to effect

the commission of the intended offense. MCM, Part IV, ¶ 4b. A person who purposely engages in conduct, which would constitute the offense if the attendant circumstances were as that person believed them to be, is guilty of an attempt. *Id.* at Part IV, ¶ 4c(3).

The evidence indicates that on 3 July 2001, the appellant and MMRA "D" drove to an off-base car wash. As previously arranged by the appellant, there they met Brian, who sold them what they all believed to be methamphetamine. The appellant and MMRA D smoked some of the methamphetamine provided by Brian, and MMRA D testified that he felt its effects. The appellant and MMRA D then drove to another location where they met DN C, who had telephoned the appellant to arrange a meeting for the purpose of buying methamphetamine. The appellant got into DN C's car. When the appellant returned to MMRA D's car, he reported that he had "sold it and it was over." Record at 260-64. A special agent of the Naval Criminal Investigative Service (NCIS) later questioned the appellant concerning this incident:

> Q. OK. So both of you went there with the intent to sell the meth to [DN C].
> A. Basically, yes.
>
> ....
>
> Q. OK. An[ ]d . . . you . . . well, tell me what happened when you pulled up in the parking lot.

A. I pulled up in the parking lot, [DN C] was sitting there, I looked at [MMRA D] an' told 'im, I was like, there-there's uh, there he is right there[. G]o up an' pull up next to 'im. He pulled up next to 'im and um, I handed [DN C] the[ ] drugs.

Q. OK. So [DN C] handed you the money 'n you handed him uh, methamphetamines.

A. Yes.

Prosecution Exhibit 26 at 6. MMRA D testified that the methamphetamine that he and the appellant smoked appeared whiter than the substance provided by the appellant to DN C, although the texture was the same "for the most part" and the packaging was "exactly" similar. Record at 274-75. He stated that he was not sure, but doubted that the methamphetamine they smoked and the substance provided by the appellant to DN C were the same. *Id.* at 265. Laboratory analysis revealed that the substance distributed by the appellant was caffeine.

In contending that the evidence supporting his conviction of this offense is insufficient, the appellant focuses his argument on the element of his intent at the time he committed the overt act of providing the substance to DN C. We find the evidence in the record, and particularly the appellant's statement to the NCIS agent, helpful in determining his intent. We conclude that the appellant agreed to provide methamphetamine to DN C when he scheduled a meeting for that purpose on 3 July 2001, and that he intended to distribute

methamphetamine when he passed the substance to DN C and received money in return.

We find the evidence legally and factually sufficient to prove the offense of attempted distribution of methamphetamine. A rational trier of fact could have found the elements of the crime of attempted distribution of methamphetamine proven beyond a reasonable doubt. We ourselves are convinced beyond a reasonable doubt of the appellant's guilt.

Conclusion

The findings of guilty and the sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

Appendix EE

UNITED STATES, Appellee

v.

John W. LEGER II,
Lance Corporal (E-3), United States Marine Corps,
Appellant

No. 06-0536/MC

UNITED STATES COURT OF APPEALS FOR
THE ARMED FORCES

Crim. App. Dkt. No. 200401098

October 17, 2006, Ordered

Counsel for Appellant: LT Richard H. McWilliams, JAGC, USNR.

Counsel for Appellee: LT Jessica M. Hudson, JAGC, USNR.

On consideration of the petition for granted of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, and in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006),

assuming that Appellant was denied his due process right to speedy post-trial review and appeal, we conclude that any error in that regard was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 17th day of October, 2006,

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

Appendix FF

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

D.A. WAGNER R.E. VINCENT E.B. STONE

UNITED STATES

v.

John W. LEGER II
Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200401098 Decided 13 April 2006

Sentence adjudged 5 September 2002. Military Judge: P.J. Betz, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (REIN), Camp Pendleton, CA.

Capt RICHARD VICZOREK, USMC, Appellate Defense Counsel
LT JESSICA HUDSON, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of violating a lawful general order and indecent assault, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The appellant was sentenced to confinement for sixty-two months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant raises four assignments of error. First, the appellant asserts that his plea to indecent assault was improvident. Second, the appellant avers that the adjudged period of confinement was inappropriately severe. Third, the appellant asserts that the convening authority did not make an informed decision in taking his action because he did not receive an opinion from the Staff Judge Advocate regarding legal errors raised by the appellant in matters submitted pursuant to RULE FOR COURTS-MARTIAL 1105, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Finally, the appellant contends the post-trial delay of nearly two years in his case was unreasonable. The appellant requests, *inter alia*, that this Court set aside the finding of guilty to the indecent assault charge and reassess the sentence.

We have examined the record of trial, the appellant's assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

On 31 March 2002, the appellant and several other Marines in his platoon visited the Camp Pendleton residence of Sergeant Jason for an Easter celebration. Although the appellant was 19 years old at the time, he drank alcohol at the celebration in violation of a lawful general order prohibiting underage drinking. In the late evening, and after drinking heavily, the appellant entered the upstairs bedroom of Sgt's three and a half year old daughter, K.W., and inserted his fingers inside her vagina. The appellant left K.W.'s bedroom and returned downstairs to the party. The following day, K.W. reported the incident to her mother. After informing Sgt of what K.W. told her, Sgt and Mrs. took K.W. to a local hospital for a medical examination. On 1 and 2 April 2002, the appellant gave sworn statements to NCIS agents confessing to underage drinking and the indecent assault.

Providence Inquiry

In his first assignment of error, the appellant contends that his guilty plea to indecent assault was improvident because he did not provide facts to substantiate the

element of the offense that requires that his act was done with the intent to gratify his lust or sexual desires. We disagree.

A military judge may not "arbitrarily reject a guilty plea." *United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987)(citing *United States v. Johnson*, 12 M.J. at 673 (A.C.M.R. 1981)). The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty, and the only exception to the general rule of waiver arises when an error materially prejudicial to the substantial rights of the appellant occurs. Art. 59(a), UCMJ; R.C.M. 910(j). Additionally, we note that a military judge has wide discretion in determining that there is a factual basis for the plea. *See United States v. Roane*, 43 M.J. 93, 94-95 (C.A.A.F. 1995). An abuse of discretion standard is applied in reviewing the question of whether a military judge erred in accepting a guilty plea. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996).

We find no substantial basis in law and fact to question the guilty plea regarding appellant's intent to gratify his lust or sexual desires. By pleading guilty, the appellant waived a trial of the facts, and thus waived the right to have the Government prove each element of indecent assault. The military judge accurately listed the elements of indecent assault and defined the terms

relevant to those elements. Record at 48-49. The appellant indicated an understanding of the elements of the offense and he acknowledged that they correctly described what he did. *Id.* at 49. Thereafter, the military judge conducted an inquiry with the appellant to determine whether a factual basis for the plea existed. The military judge elicited facts from the appellant establishing each element of the offense. *Id.* at 49-55. Regarding the element of specific intent, the appellant, a 19-year-old Marine, admitted that he entered the bedroom of a three and a half year old girl and inserted his fingers inside her vagina. *Id.* at 50. Moreover, when the military judge asked the appellant what his intent was when he touched the victim, the appellant replied, "I believe my intent, sir, was to gratify my lust or sexual desires, sir." *Id.* at 51. The military judge thereafter asked the appellant if he found the victim "attractive." The appellant replied that he did not. The offense of indecent assault, however, does not require that the perpetrator find the victim to be attractive. We thus have no difficulty concluding that the appellant's guilty pleas were provident to the offense of indecent assault.

Sentence Appropriateness

In the appellant's second assignment of error, he asserts the adjudged 62 months of confinement is inappropriately severe. We decline to grant relief.

In determining the appropriateness of a sentence, we are to afford the appellant individualized consideration

under the law. Specifically we must review the appropriateness of the sentence based upon the "'nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267-68 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). This requires a balancing of the offenses against the character of the offender.

The appellant abused his status as the friend of a fellow Marine to commit a particularly heinous act upon that Marine's young daughter. The record was replete with evidence that the girl was suffering lasting traumatic effects from the appellant's indecent assault. Moreover, the victim's parents continually feel guilt about the assault and blame themselves for allowing it to happen. Under the circumstances of this case, the seriousness of the offenses clearly outweighed the mitigating evidence that was produced at trial. The adjudged and approved sentence is appropriate for this offender and his offenses. Accordingly, we decline to grant relief.

Staff Judge Advocate's Recommendation (SJAR)

As his third assignment of error, the appellant contends that the convening authority did not make an informed decision in taking his action because he did not receive an opinion from the staff judge advocate regarding legal errors raised by the appellant in matters submitted pursuant to R.C.M. 1105. We disagree.

R.C.M. 1106(d)(4) requires that the staff judge advocate

"shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105...." The appellant raises two issues of legal error in his R.C.M. 1105 submissions, sentence severity and improvident plea. Although the staff judge advocate's recommendation did not contain an explicit rebuttal to the appellant's alleged legal errors, none is required. Under R.C.M. 1106(d)(4) the staff judge advocate's response "may consist of a statement of agreement or disagreement with the matter raised by the accused." Here, the staff judge advocate stated that "[i]n [his] opinion, nothing offered by the defense during trial or in **post-trial submission** warrants clemency. I recommend you approve the sentence as adjudged." SJAR of 22 Apr 2003 at 3 (emphasis added). This advice satisfied R.C.M. 1105. We therefore decline to grant relief.

Post-Trial Delay

The appellant argues that he was denied a speedy post-trial review of his court-martial because 720 days passed between his court-martial and docketing of the case before this court. We analyze claims of post-trial delay first as a constitutional right of every appellant, and second, if no constitutional violation is established, under our broad Article 66(c), UCMJ mandate. *United States v. Brown*, 62 M.J. 602, (N.M.Ct.Crim.App. 2005)(en banc).

A. *The Constitutional Analysis*

We look to four factors in determining if post-trial processing delay has violated the appellant's due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely appeal; and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004)). As for the first two factors, the Government cites a lack of manpower, a high volume of cases, and an administrative oversight for the 720 day delay. Regarding the third factor, the record of trial reveals that the appellant first asserted his right to speedy review more than 30 months after his date of trial. Regarding the fourth factor, we do not find any evidence of prejudice suffered by the appellant from the delay in this case, and we likewise do not find that the delay in this case is so egregious as to give rise to a presumption of prejudice. Considering all four factors, we conclude that there has been no due process violation due to the post-trial delay.

B. *Article 66(c), UCMJ, Review*

In determining whether or not the findings and sentence in this case should be approved under Article 66, UCMJ, we again consider the four factors set forth in *Jones*. In addition, we also consider several factors discussed in *Brown*: the length and complexity of the case, both at trial and on appeal; any evidence of gross negligence on the part of the Government; the offenses of which the

appellant has been found guilty, and the sentence.

Regarding the *Jones* factors, we again find that although the length of the delay is facially excessive, the Government provided a legitimate basis for the delay. Further, the appellant has not demonstrated, and we do not find, prejudice. Moreover, there is no evidence of gross negligence on the part of the Government. Finally, we observe that the offenses for which the appellant was found guilty were severe, and that the sentence he received was appropriate for this offender and his offenses.

In conclusion, we do not believe that the post-trial delay affects the sentence that should be approved and decline to grant relief.

Conclusion

Accordingly, the findings and sentence are affirmed, as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court

Appendix GG

UNITED STATES, Appellee

v.

Christopher M. LUCAS, Staff Sergeant (E-6), U.S. Marine Corps, Appellant

No. 06-0004/MC

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200300760

September 11, 2006, Ordered

Counsel for Appellant: LT Darrin W. Mackinnon, JAGC, USNR.

Counsel for Appellee: LT Justin Dunlap, JAGC, USNR.

On consideration of the granted issue, in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Rodriguez-Rivera, 63 M.J. 372 (C.A.A.F. 2006), we conclude that Appellant was denied his due process right to speedy post-trial review and appeal, that the error was not harmless beyond a reasonable doubt, but that "to fashion relief that would be actual and meaningful in this case would be disproportionate to the possible harm generated from the

delay." *Id.* at 386. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in United States v. Moreno, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix HH

IN THE U.S. NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

C.W. DORMAN, C.A. PRICE, R.H. CAUTHEN.

UNITED STATES

v.

Christopher M. LUCAS, Staff Sergeant (E-6),
U.S. Marine Corps

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

NMCCA 200300760 Decided 15 September 2005

Sentence adjudged 15 January 2002.
Military Judge: L.K. Burnett.
Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Corps Detachment, Fort Leonard Wood, MO.

LT COLIN A. KISOR, JAGC USNR, Appellate Defense Counsel.

LT GUILLERMO J. ROSAS, JAGC, USNR, Appellate Government Counsel.

CAUTHEN, Judge:

A special court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of four specifications of cruelty and maltreatment and three specifications of assault, in violation of Articles 93 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 893 and 928. After findings were announced, the military judge dismissed two of the assault specifications as being an unreasonable multiplication of charges. The sentenced as adjudged and approved consisted of a reduction to pay grade E-1 and a bad-conduct discharge.

After carefully considering the record of trial, the appellant's assignments of error[1], the Government's

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[1] I. THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT WHEN SHE PROHIBITED APPELLANT FROM MAINTAINING HIS INNOCENCE IN HIS UNSWORN STATEMENT ON SENTENCING.

II. THE MILITARY JUDGE ABUSED HER DISCRETION IN GRANTING THE GOVERNMENT'S CHALLENGE OF SSGT [S] FOR CAUSE.

III. THE MILITARY JUDGE ABUSED HER DISCRETION IN NOT GRANTING THE DEFENSE

response and the appellant's reply, we conclude that the

COUNSEL'S CHALLENGE OF MAJOR [H] FOR CAUSE AND THE TRIAL DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT PRESERVING THE ERROR FOR APPELLATE REVIEW.

IV. THE MILITARY JUDGE ABUSED HER DISCRETION IN NOT GRANTING THE DEFENSE COUNSEL'S CHALLENGE OF GUNNERY SERGEANT [S] FOR CAUSE.

V. THE MILITARY JUDGE COMMITTED PLAIN ERROR IN NOT SUA SPONTE EXCUSING CAPTAIN [H] FOR CAUSE.

VI. THE EVIDENCE ADDUCED AT TRIAL IS BOTH FACTUALLY AND LEGALLY INSUFFICIENT TO SUPPORT A CONVICTION BEYOND A REASONABLE DOUBT.

VII. A BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE FOR APPELLANT, A STAFF SERGEANT WHO HAD SERVED HONORABLY FOR 11 YEARS.

VIII. APPELLANT HAS BEEN DENIED SPEEDY POST-TRIAL REVIEW OF HIS COURT-MARTIAL IN THAT 457 DAYS PASSED BEFORE THE RECORD OF TRIAL WAS DOCKETED AT THE NAVY-MARINE COURT [sic] OF CRIMINAL APPEALS FOR APPELLATE REVIEW.

findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant, a staff sergeant of Marines, was an instructor at the Motor Transport School on board Fort Leonard Wood, Missouri. The maltreatment, cruelty, and assault involved Lance Corporal (LCpl) W, U.S. Marine Corps, LCpl L, U.S. Marine Corps, and Mr. W, formerly an active duty Marine, all of whom were students at the school during April through July of 2000.

LCpl L

The appellant told LCpl L to go up to another staff non-commissioned (NCO) and ask, "What's up, homeboy?" When LCpl L complied, he was called into the shed with the appellant and other Staff NCOs. They made him do pushups, and while he was doing so, the appellant struck LCpl L on the back and legs with a broom handle and fists. Similar incidents occurred on other occasions. The appellant also conducted "tailgate PT" on LCpl L, striking him with a broomstick while LCpl L was required to repeatedly pick up and put down a tailgate from a 5-ton truck.

LCpl W

On several occasions, the appellant tried to loosen the

cuff on the sleeve of LCpl W's cammie blouse. On one of the occasions, the appellant began pulling on the cuff sleeve of LCpl W's cammie sleeve to loosen it and, while doing so, asked her if it was "pissing her off." The appellant then punched her in the arm where her sleeve was folded. The punch was hard enough to move her body. The appellant asked, "Did it hurt?" When LCpl W said no, the appellant punched her in the arm below the sleeve. He then asked, "Did it hurt, then?" Another Staff NCO came up and began to punch LCpl W in the other arm, in full view of the appellant. The appellant punched LCpl W about ten times. The punches could be heard, and they hurt. The appellant punched LCpl W in the right thigh, causing her knee to cave in.

Mr. W

The appellant and another Staff NCO called the entire class to form a tight circle around a toolbox. The shoulder-to-shoulder formation blocked the view of others in the area. The appellant was inside the circle and called out LCpl L. LCpl L was instructed to grasp the desk-high toolbox and was then struck by the appellant and the other Staff NCO multiple times on the back and legs with a broom handle. The broom handle was about one inch thick and about five feet long. After they were through with LCpl L, the appellant instructed Mr. W to come forward and grab the toolbox. The appellant struck Mr. W with the broomstick on the back of the legs.

Restricting the Content of the Unsworn Statement

In his first assignment of error, the appellant asserts that the military judge erred to his substantial prejudice when she prohibited him from maintaining his innocence in his unsworn statement on sentencing. We disagree.

"We review the military judge's decision to restrict the unsworn statement under an abuse of discretion standard, just as we would for any other ruling admitting or excluding evidence. *United States v. Sullivan,* 42 M.J. 360, 363 (C.A.A.F. 1995). However, we must do so with full regard for the largely unfettered nature of an accused's right to make an unsworn statement." *United States v. Sowell,* 59 M.J. 954, 955 (N.M.Ct.Crim.App. 2004), *rev. granted*, 60 M.J. 394 (C.A.A.F. 2004).

We will reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if her decision is influenced by an erroneous view of the law. *Sullivan,* 42 M.J. at 363 (citing S. Childress & M. Davis, 2 Federal Standards of Review § 11.10 at 11-41 (2d ed. 1992)).

The right to make an unsworn statement is a valuable right, and one that is not to be undercut or eroded. *United States v. Partyka,* 30 M.J. 242, 246 (C.M.A. 1990). Although this right is broadly construed, it is not wholly unconstrained. *United States v. Grill,* 48 M.J. 131, 133 (C.A.A.F. 1998).

On findings, regarding the toolbox incident, defense counsel argued the failure of the Government to present witnesses, specifically saying, "Where are the other students who were in that class? We heard that they were all gathered around in a circle. Where are they at?" Record at 225.

The following exchange occurred during the appellant's unsworn statement:

[ACC:] As you have seen, at this court-martial, you had three actual Marines come in and say that I did this, that, and the other and you voted against me. The only thing I ask is that, you voted against me, but the information was that -- Mr. [W] said that I put a class in a circle and then I put him in the middle and commenced to beat him on his butt and [LCpl L] on his butt. Now, I ask you generally, why wasn't [sic] those students here to actually testify against that? Because if that did happen, you would have had 20 students sitting there taking the stand right there or you would have seen statements written from those students right there.

Also, there were students that wanted to make fricking – –

MJ: -- excuse me for one minute. I don't mean to interrupt you, but the members have already found you guilty of the offenses that they found you guilty of.
ACC: Yes, ma'am.

MJ: So you need to move on. They are not going to redeliberate and decide those incidents. So you need to move on.

ACC: Yes, ma'am. That's it. Thank you.

Record at 250. The appellant offered nothing further as an unsworn statement.

The only logical consequence of the appellant's statements regarding the failure of the Government to present certain witnesses is to tell the members that their findings are wrong, improperly implying that they should reconsider their verdict. *United States v. Teeter,* 16 M.J. 68, 73 (C.M.A. 1983); *Sowell,* 59 M.J. at 957. Indeed, the appellant characterizes the statements as "maintaining his innocence." However, an accused may not continue to contest adjudged guilt during the sentencing phase of trial.

A general court-martial convicted Teeter of premeditated murder, murder while perpetrating the offense of rape, and rape. He did not testify on the merits, but after he was convicted, he made a sworn statement in extenuation and mitigation. During this testimony, he attempted to resurrect his alibi defense, which had been presented on his behalf on the merits.
Pursuant to Government objection, the military judge instructed the members to disregard that portion of his testimony. The appellant in that case asserted that the military judge erred by instructing the members to

disregard those portions of his sworn testimony. The court held that:

The record discloses that appellant was afforded a full and fair opportunity to present his defenses during the findings phase of the trial, and that he exercised that right extensively. We are aware of no obligation, either under the Constitution or elsewhere, to provide an accused two chances to defend on the merits. In our opinion, the procedures established by the Uniform Code of Military Justice, as implemented by the Manual for Courts-Martial, are generally sufficient to satisfy due-process requirements. As appellant's alibi testimony did not even marginally relate to matters in extenuation or mitigation, the military judge did not err in excluding such irrelevant testimony.

Teeter, 16 M.J. at 73 (citing *United States v. Tobita,* 3 C.M.A. 267, 12 C.M.R. 23 (C.M.A. 1953).

Teeter involved an accused's sworn testimony rather than an unsworn statement; but, as in *Sowell*, it is controlling in this case, 59 M.J. at 958. We note here, as we did in *Sowell*, that it is inappropriate to include matter in an unsworn statement that is "'gratuitously disrespectful toward superiors or the court [or] a form of insubordination or defiance of authority.'" *Grill,* 48 M.J. at 132 (quoting *United States v. Rosato,* 32 M.J. 93, 96 (C.M.A. 1991)). We view the appellant's challenge to the court's decision on findings as reasonably constituting a form of defiance of authority -- a long-recognized restriction on the right of allocution, and one that was

specifically identified as such in both *Grill* and *Rosato.*

In our system, an accused may be convicted of an offense by vote of two-thirds of the members. That means that up to one-third of the members might believe that the accused is not guilty, or at least that the Government has not proven its case beyond a reasonable doubt. In addition, those members voting guilty need be convinced beyond a reasonable doubt, not to an absolute certainty, thereby leaving room for residual doubt. " Residual doubt" has been defined as "a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'" *Franklin v. Lynaugh,* 487 U.S. 164, 188, 101 L. Ed. 2d 155, 108 S. Ct. 2320 (1988)(O'Connor, J., concurring).

In *Franklin*, the Supreme Court held that an accused in a capital case has no constitutional right to raise residual doubt before the sentencing authority.

Our edict that, in a capital case, "'the sentencer ... (may) not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense,'" in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. . . . This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

Franklin, 487 U.S. at 174 (citations omitted).

In a concurring opinion, Justice O'Connor met the constitutional claim directly:

Our cases do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt. We have recognized that some States have adopted capital sentencing procedures that permit defendants in some cases to enjoy the benefit of doubts that linger from the guilt phase of the trial, see *Lockhart v. McCree*, 476 U.S. 162, 181, 90 L. Ed. 2d 137, 106 S. Ct. 1758 (1986), but we have never indicated that the Eighth Amendment requires States to adopt such procedures. To the contrary, as the plurality points out, we have approved capital procedures that preclude consideration by the body of "residual doubts" about guilt.

Franklin, 487 U.S. at 187-188 (citing *Lockhart*, 476 U.S. at 173 n.6).

In *United States v. Thomas,* 43 M.J. 550, 583-84 (N.M.Ct.Crim.App. 1995) *rev'd in part on other grounds,* 46 M.J. 311 (C.A.A.F. 1997), also a capital case, this court, citing *Franklin*, held that failure to instruct on residual doubt was not plain error. Since it is not a constitutional right, even in capital cases, jurisdictions may adopt rules and procedures that allow or preclude consideration of "residual doubt" by the

sentencing authority. The rules and procedures adopted for use in courts-martial do not allow it.

Prior to the 1995 edition of the RULES FOR COURTS-MARTIAl 924, MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 924 allowed members to reconsider their findings until sentence was announced in open court. Since then, members' reconsideration of findings is allowed only up to the time such findings are announced in open court. Since findings had already been announced in open session, the members in the appellant's case could not reconsider their verdict. R.C.M. 924, MCM (2000 ed.).

At sentencing, the basis in law for the appellant's right to make an unsworn statement is R.C.M. 1001(c)(2)(A), which states, in pertinent part that "the accused may testify, make an unsworn statement, or both in extenuation, in mitigation or to rebut matters presented by the prosecution, or for all three purposes whether or not the accused testified prior to findings."

We hold that the plain language of the rule specifically limits the scope of the appellant's statement, whether sworn or unsworn. Matters in extenuation and mitigation, though broad concepts, are clearly defined in R.C.M. 1001(c)(1), and by definition pose some kind of limitation on the relevant subject matter of the unsworn statement. *Sowell,* 59 M.J. at 958.

R.C.M. 1001(c)(1) states, in pertinent part:

(A) *Matter in extenuation.* Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense, which do not constitute a legal justification or excuse.

(B) Matter in mitigation. Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency.

We need not attempt to probe the outer limits of relevance or the specific restrictions that apply to an appellant's unsworn statement beyond those already established by existing precedent. It is sufficient for our purpose to point out that the military judge narrowly limited the appellant's unsworn statement in this case, forbidding only reference to factual matters directly challenging the verdict. The logical consequence of the appellant's statements was to suggest that the members had no legal right to sentence the appellant at all. The information excluded was thus neither matter in extenuation or mitigation, nor rebuttal under R.C.M. 1001(c), and could not have assisted the members in their task of determining a just sentence. *Sowell*, 59 M.J. at 958.

Even though the appellant stopped and said nothing further when interrupted by the military judge, there is nothing in the record to suggest that he would not have been allowed to present other matter relevant to extenuation and mitigation. Indeed, the appellant

submitted documentary evidence in the form of his service record book as well as the testimony of his mother and father.

We conclude that the appellant's mention of the absence of Government witnesses was rightly excluded because: (1) it challenged, during the presentencing hearing, the correctness of the members' decision on the issue of guilt; and, (2) it "did not even marginally relate to" those matters within the relevant scope of inquiry during the sentencing stage of trial, as defined by R.C.M. 1001(c)(1). For both of these reasons, the military judge's ruling is supported by *Teeter* and R.C.M. 1001(c)(1). With this legal support for her ruling, we cannot find that the military judge abused her discretion by restricting the content of the appellant's unsworn statement.

Granting the Government's Challenge for Cause

In his second assignment of error, the appellant alleges that the military judge abused her discretion in granting the Government's challenge of a member for cause. We disagree.

An accused "'has a constitutional right, as well as a regulatory right, to a fair and impartial panel.'" *United States v. Strand,* 59 M.J. 455, 458 (C.A.A.F. 2004)(quoting *United States v. Wiesen,* 56 M.J. 172, 174 (C.A.A.F. 2001)). A member shall be removed for cause if it is shown that he or she should not sit "in the interest of having the court-martial free from substantial doubt as

to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). The party that makes the challenge for cause has the burden of proving that grounds for a challenge exist. R.C.M. 912(f)(3).

In evaluating a military judge's ruling on a challenge for cause, it is "appropriate to recognize the military judge's superior position to evaluate the demeanor of court members. A military judge's ruling on a challenge for cause will therefore not be reversed absent a clear abuse of discretion." *United States v. James,* 61 M.J. 132, 138 (C.A.A.F. 2005)(citing *United States v. McLaren,* 38 M.J. 112, 118 (C.M.A. 1993)); *see also United States v. White,* 36 M.J. 284, 287 (C.M.A. 1993).

In the context of challenges brought by a defendant, "military judges must liberally grant challenges for cause." *United States v. Downing,* 56 M.J. 419, 422 (C.A.A.F. 2002)(citing *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996); *see also McLaren,* 38 M.J. at 118 (quoting *United States v. Glenn,* 25 M.J. 278, 279 (C.M.A. 1987)). In *James,* our superior court addressed the issue of whether the "liberal grant" policy is applicable when the government brings the challenge.

Unlike the convening authority, who has the opportunity to provide his input into the makeup of the panel through his power to detail "such members of the armed forces as, in his opinion, are best qualified for the duty," the defendant has only one peremptory challenge at his or her disposal. The liberal grant rule protects the "perception or appearance of fairness of the military

justice system." Given the convening authority's broad power to appoint, we find no basis for application of the "liberal grant" policy when a military judge is ruling on the Government's challenges for cause. *James*, 61 M.J. at 138 (footnote and citations omitted).

When the military judge asked the panel during general *voir dire* about whether they had formed or expressed an opinion concerning the appellant's guilt or innocence, SSgt S stated, "Yes, ma'am." Record at 51.

When the military judge asked the panel during general *voir dire* about knowledge of witnesses, SSgt S volunteered that he knew the accused. The following exchange took place between the military judge and SSgt S:

MJ: You know the accused in this case?
MBR: Yes. Less than a year ago, we went to Staff Academy together.
MJ: And were you friends with him or was he just going to the -- what was it?
MBR: The Staff Resident Academy, yes, ma'am.
MJ: Were you just at the Staff Resident Academy together or were you close to him? How well do you know him?
MBR: I would say I know him well enough to formulate an opinion of his character already, ma'am.

Record at 47-48.

When SSgt S was called back for individual *voir dire*, the following exchange took place:

[Examination by Trial Counsel:]

TC: Staff Sergeant, you indicated that you formed an opinion as to the accused's military character. What's that opinion?
MBR: I have a favorable impression of him, sir.
TC: What does that stem from?
MBR: My time spent with him at Staff Academy.
TC: Were you roommates with the accused?
MBR: No, sir.
TC: What kind of interaction did you have with him at the Academy?
MBR: You have a lot of interaction at the Academy, whether it be PT, we all live in the same barracks, everyone is very close there. I wouldn't say we talked frequently, but you talk a lot. You have a lot of discussions about senior leadership and things like that. I remember a few discussions.
...

TC: If witnesses came on the stand and under oath made allegations against Staff Sergeant Lucas, okay, that he committed an assault upon them and Staff Sergeant Lucas were to take the stand and deny those allegations, the time that you spent with Staff Sergeant Lucas and your opinions that you have with him; is that going to cause you to weigh more favorably his testimony over the testimony of other witnesses?

MBR: It is possible, sir.

...

[Examination by Defense Counsel:]

[DC:] As a Staff Sergeant of Marines, you were able to discern between personal feelings and official business?
MBR: Yes, sir.
DC: So in this case, you understand your official duty is to hear the evidence and to make the decision solely based on the evidence?
MBR: Yes, sir.
DC: You wouldn't necessarily give more credence to the testimony of a Gunnery Sergeant vice the testimony of a Lance Corporal just because of the fact that one is a Gunnery Sergeant and one is a Lance Corporal; is that correct?
MBR: Yes, sir.
DC: In the same light, you wouldn't necessarily give more credence or believe more the testimony of a Staff Sergeant, Staff Sergeant Lucas, than you would that of a Lance Corporal just because of their rank; is that correct?
MBR: Not just because of his rank, that's correct, sir.
DC: And just to clarify in my mind, you are... able to be here today and hear the evidence and make any decisions that you are asked to make solely based on the evidence that you hear?

MBR: Yes, sir.

...

[Examination by the Military Judge:]

MJ: So until you showed up today and saw the accused and recognized him from school, you had no idea you were coming to a court-martial with this accused and these charges?
MBR: That's correct, ma'am.
MJ: Okay. At this point do you feel that you have formed any opinion as to the offenses on the charge sheet, whether that means he's guilty or not guilty of these offenses?
MBR: Not a firm opinion, but I am already leaning to one side, yes, ma'am.
MJ: What side are you leaning toward?
MBR: Not guilty, ma'am.
MJ: Okay. So essentially, you are saying that if people got up on the stand and testified, witnesses testified against the accused that he committed certain acts against them, right now you are saying that you [are] less likely to believe that these witnesses are telling the truth?
MBR: Not necessarily that they would not be telling the truth, but because I already have a sort of a preopinion in my mind, I would have to hear something overwhelming, if you know what I am saying, ma'am.
MJ: I see what you are saying. Have some evidence which you think was totally believable to show you that the accused was guilty, in other words?
MBR: Yes, ma'am.
MJ: What if he got on the stand? What if some witnesses got on the stand and in your mind they were very

credible, they came off very credible; would you necessarily think well, they were credible but I know Staff Sergeant Lucas and I don't think he did this, even if he didn't take the stand?
MBR: It is possible that I could believe the witnesses.
MJ: But you think there is a good likelihood that you are just going [to] base your opinion on your former relationship with him at the Academy?
MBR: Not solely, ma'am.
MJ: But that that might cloud your ability to?
MBR: Yes, ma'am.

Id. At 70-74.

The military judge then granted the Government's challenge cause stating, "I feel that he has expressed a definite opinion as to guilt or innocence of the accused at this point and I am going to grant that challenge." Record at 75.

The appellant characterizes SSgt S's responses as "exactly what the criminal justice system expects of jurors, that they presume the accused is innocent until the government proves beyond a reasonable doubt that the accused is guilty." Appellant's Brief of 30 Mar 2004 at 6; *see* record at 75. But SSgt S's answers evince not a generalized notion of a presumption of innocence but a predisposition based upon a personal relationship with and favorable opinion of the appellant. The discussion following R.C.M. 912(f)(1)(N) provides that grounds for challenge under this subsection may include that the member "has a decidedly *friendly* or hostile attitude

toward a party. . ." (Emphasis added). R.C.M. 912(f)(1)(M) provides a grounds for challenge when the member has informed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged. SSgt S stated so. While SSgt S provided appropriate responses to the rehabilitative questions, the questions themselves were not on point. They focused solely on rank and not the relationship. In addition, the military judge not only was able to hear the responses but also able to evaluate SSgt S's demeanor.

The military judge allowed a full inquiry by both sides into SSgt S's knowledge of and relationship with the appellant. She questioned the member thoroughly, even bringing him back into the courtroom for a third round of questions. There is no evidence that the military judge applied the liberal grant policy in making her decision. To the contrary, it appears that she carefully considered all of SSgt S's responses and his demeanor in reaching her decision. We conclude that the military judge did not abuse her discretion in granting the Government's challenge for cause.

Denying the Defense Challenges for Cause and Not *Sua Sponte* Excusing a Member

At trial, the appellant challenged for cause two members, Major (Maj) H and Gunnery Sergeant (GySgt) S, pursuant to R.C.M. 912(f)(1)(N). The appellant questioned, but did not challenge, Captain (Capt) H. In his third assignment of error, the appellant asserts that the military judge erred when she denied his challenge

for cause to Maj H and that trial defense counsel was ineffective for failing to preserve the issue for appellate review. In his fourth assignment of error, the appellant asserts that the military judge erred when she denied his challenge for cause to GySgt S. In his fifth assignment of error, the appellant asserts that the military judge erred when she failed to excuse Capt H *sua sponte*. We disagree.

While R.C.M. 912(f)(1)(N) applies to both actual and implied bias, the thrust of this rule is implied bias. *United States v. Minyard*, 46 M.J. 229, 231 (C.A.A.F. 1997). Moreover, "the focus of the rule is on the perception or appearance of fairness of the military justice system[,]" *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995), since "the rule 'reflects the President's concern with avoiding even the perception of bias, predisposition, or partiality.'" *Minyard*, 46 M.J. at 231 (quoting *United States v. Lake*, 36 M.J. 317, 323 (C.M.A 1993)).

A military judge is given "great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member." *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000)(citing *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999)). This court, however, gives less deference to the military judge when reviewing a "finding on implied bias because it is objectively 'viewed through the eyes of the public.'" *Napolitano*, 53 M.J. at 166 (quoting *Warden*, 51 M.J. at 81). "Implied bias is viewed through the eyes of the

public, focusing on the appearance of fairness." *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)(citing *Dale*, 42 M.J. at 386). As a result, an objective standard is used when reviewing the judge's decision regarding implied bias.

Thus, "'issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than de novo.'" *United States v. Miles*, 58 M.J. 192, 195 (quoting *Downing*, 56 M.J. at 422). Furthermore, "when there is no actual bias, 'implied bias should be invoked rarely.'" *Warden*, 51 M.J. at 81-82 (quoting *Rome*, 47 M.J. at 469). "'Due process does not require a new trial every time a juror has been placed in a potentially compromising situation.'" *United States v. Lavender*, 46 M.J. 485, 488 (C.A.A.F. 1997) (quoting *Smith v. Phillips*, 455 U.S. 209, 217, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982)). Instead, our superior court has observed that "implied bias exists when, regardless of an individual member's disclaimer of bias, 'most people in the same position would be prejudiced [i.e. biased].'" *Napolitano,* 53 M.J. at 167 (citations omitted). In making judgments regarding implied bias, we look at the totality of the factual circumstances. *Strand*, 59 M.J. at 458-59.

Maj H

Maj H disclosed that in 1984 or 1986 his wife (then his girlfriend), while working as a hostess in a restaurant, had been assaulted and threatened with a knife by two of the kitchen staff. Although he questioned Maj H about

family members involved in law enforcement, defense counsel asked no questions about the assaults. The military judge, however, did ask questions concerning the assaults and Maj H's ability to put the incidents out of his mind and judge the facts of the case fairly. Maj H stated that he could look at the facts and sentence issues fairly. When given another opportunity to question Maj H, defense counsel declined.

The appellant challenged Maj H on the grounds that Maj H would not be able to put the incident involving his wife out of his mind during deliberations. In denying the appellant's challenge, the military judge stated:

The Major stated that he could forget essentially or take it out of his mind the fact that this happened to his spouse. It happened quite a while ago. Obviously, it was a civilian situation, not involving anything regarding military. She worked in a hotel or the kitchen of a hotel, if I recall correctly. It was a chef that took a sushi knife to her. He didn't appear at all to be affected by that and for that reason, I am going to deny that challenge.

Record at 76.

GySgt S

GySgt S disclosed that his daughter had been raped by two men when she was twelve years old and that the case was pending in civilian court. Defense counsel asked about the results of the case, and GySgt S replied that the perpetrators had been found guilty. When defense counsel asked whether the incident would cloud

his ability to be impartial, GySgt S replied, "Not at all, sir." *Id.* at 66. Even so, the military judge asked questions concerning the incident and GySgt S's ability to put the incident out of his mind and judge the facts of the case fairly. GySgt S stated that it would not cloud his ability to fairly evaluate the evidence. When given another opportunity to question GySgt S, defense counsel declined.

The appellant then challenged GySgt S on the grounds that he would not be able to put the incident involving his daughter out of his mind during deliberations in denying the challenge, the military judge stated:
I don't feel that the offenses that were committed against GySgt [S's] daughter are even remotely similar to the offenses listed on the charge sheet. Obviously, there is one offense with regard to potential sexual harassment on a female, but, I think it's not that similar of a case. GySgt [S] did not indicate that he would be affected by the past experiences and although it was obviously a very traumatic event for him and his family, if it were a different type of situation, indecent assaults, acts of that nature, rape, then I would say perhaps he would be affected by it. But I don't think he's going to be affected in this case.

Id. at 76-77.

Capt H

Capt H disclosed that he was trial counsel's neighbor and friend and knew him well enough to hide Christmas

presents at his house. Defense counsel asked one question about whether Capt H's relationship with trial counsel would cause him to be more apt to believe the Government's evidence than defense evidence. Capt H replied, "No, not at all." *Id.* at 62. Nevertheless, the military judge questioned Capt H about his relationship with the trial counsel and any potential bias. Capt H stated that he could look at the evidence impartially, that he would not vote guilty just because he knew trial counsel and that, as a Captain in the Marine Corps, he felt the same about trial and defense counsel. When given another opportunity to question Capt H, defense counsel declined.

The appellant did not challenge Capt H. He now asserts that the military judge should have excused him *sua sponte* because of his relationship to the trial counsel.

This is not a case where the salient facts went unnoticed or unexamined on the record. We are satisfied with the transparent nature of the military judge's inquiry with the appellant and his counsel present, and with the deliberate manner of the military judge's *voir dire*. The appellant has not made a showing of actual bias; nor argued that the incidents or relationship, in fact, influenced the panel's deliberations. In addition, each of the questioned members stated that they would not be influenced by the incidents or relationship. A "'member's unequivocal statement of a lack of bias can . . . carry weight' when considering the application of implied bias." *Strand*, 59 M.J. at 460 (quoting *United States v. Youngblood*, 47 M.J. 338, 341 (C.A.A.F. 1997).

Based on the totality of these circumstances, we hold that Maj H's, Capt H's, and GySgt S's service as members of the appellant's court-martial did not raise a significant question of legality, fairness, or impartiality, to the public observer pursuant to the doctrine of implied bias. The military judge did not abuse her discretion and we find no plain error.

The appellant failed to preserve his challenge to Maj H in the manner prescribed by R.C.M. 912(f)(4). Despite this fact, we have fully considered the appellant's assignment of error regarding Maj H. We conclude that since the military judge did not err when she denied the appellant's challenge to Maj H, the appellant suffered no prejudice from trial defense counsel's failure to preserve the issue. Therefore, we decline to grant relief on this ground. We find these three assignments of error lacking in merit.

Post-Trial Delay

In his eighth assignment of error, the appellant asserts that he has been denied speedy post-trial review of his court-martial in that 457 days passed before the record of trial was docketed with this court for appellate review. We disagree.

The salient dates and actions are set out below.

15 JAN 02 Sentenced

7 JUN 02	Record of trial authenticated by Military Judge
30 OCT 02	Staff Judge Advocate's Recommendation (SJAR)
4 NOV 02	SJAR served on defense counsel
18 NOV 02	Defense request for 20 additional days in which to submit clemency matters
6 DEC 02	Defense clemency request submitted
23 DEC 02	Supplemental SJAR submitted
28 JAN 03	Convening Authority's Action / Court-Martial Order
17 APR 03	Case docketed at NAMARA

The appellant does not contend that the delay rises to the level of a due process violation, but rather asserts that setting aside the bad-conduct discharge is appropriate under this court's powers pursuant to Article 66, UCMJ. However, we will also consider whether a due process violation occurred.

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the

length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely appeal;, and, (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.* (quoting *Toohey*, 60 M.J. at 102).

We conclude that the delay in this case is not unreasonable. In addition, in the record, we find no assertion of the right to a timely appeal, nor do we find any claim or evidence of prejudice. Thus, we conclude that there has been no due process violation due to the post-trial delay.

Appellate relief under Article 66(c), UCMJ, should be viewed as a last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). In the absence of any claim or evidence of prejudice, or any other basis for relief due to the post-trial delay, we decline to grant relief on this ground. *Id. at* 224; *see also United States v. Bigelow*, 57 M.J. 64, 69 (2002 C.A.A.F.); *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001); *United States v. Jenkins*, 38 M.J. 287, 288 (C.M.A. 1993).

Conclusion

We have considered the remaining assignments of error and find them to be without merit. Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix II

UNITED STATES, Appellee

v.

Scott R. MCCLELLAND, Captain (O-6), Medical Corps, U. S. Navy, Appellant

No. 06-0440/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200101300

September 11, 2006, Ordered

Counsel for Appellant: LT Richard H. McWilliams, JAGC, USNR.

Counsel for Appellee: LT Mark H. Herrington, JAGC, USNR.

On consideration of the granted issue, in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in United States v. Moreno, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix JJ

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

W.L. RITTER C.L. CARVER K.K. THOMPSON

UNITED STATES

v.

Scott R. MCCLELLAND
Captain (O-6), Medical Corps, U. S. Navy

NMCCA 200101300 Decided 24 January 2006

Sentence adjudged 13 September 2000. Military Judge: A.W. Keller, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

Capt JAMES VALENTINE, USMC, Appellate Defense Counsel

RICHARD T. MCNEIL, Civilian Defense Counsel

LT CHRISTOPHER HAJEC, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

RITTER, Senior Judge:

Pursuant to his pleas, the appellant was convicted by a military judge, sitting as a general court-martial, of violating a lawful general regulation on divers occasions, sodomy on divers occasions, two specifications of conduct unbecoming an officer, and adultery, in violation of Articles 92, 125, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 925, 933, and 934. The appellant was sentenced to dismissal, confinement for 12 months, forfeiture of $500.00 pay per month for 24 months, and to be reprimanded. The convening authority approved the sentence as adjudged, but suspended confinement in excess of 6 months for the period of confinement served plus 12 months thereafter, and suspended all adjudged forfeitures for 12 months from the date of his action. He also waived all automatic forfeitures for 6 months from the date of his action.

The appellant contends that: (1) the sentence was unduly severe, (2) the conviction for sodomy violates his constitutional right to privacy, and (3) the convening authority was not impartial and was thus disqualified from evaluating the appellant's clemency petition and taking action in this case.

We have carefully reviewed the record of trial, the

appellant's three assignments of error, and the Government's response, and conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed.[1] *See* Arts. 59(a) and 66(c), UCMJ.

Sentence Severity

The appellant, a Navy captain, served as the director of clinical services and as a psychiatrist at the Naval Hospital at Marine Corps Base, Camp Lejeune, North Carolina. While treating a patient, Staff Sergeant (SSgt) R, for panic disorder and addictive sexual behavior, the appellant engaged in a sexual relationship with her, although both he and SSgt R were married to other people. Over a 21-month period, he engaged in sexual intercourse with SSgt R about 4 times, oral sodomy about 10 times, and anal sodomy twice. While all the incidents of sexual intercourse and anal sex occurred either at SSgt R's home or at an off-base hotel, some of the oral sex incidents occurred in the appellant's office during SSgt R's scheduled counseling appointments. He also called her frequently from his government telephone, and discussed sexual topics for his own sexual gratification.

During the last 5 months of this relationship, the appellant also attempted to enter into a sexual relationship with another of his patients, CJ. She was

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[1] The Motion for Oral Argument submitted by the appellant on 23 July 2004 is hereby denied.

the newly married wife of a Marine sergeant, and the appellant had been treating her for bulimia, an eating disorder. First, the appellant arranged a special counseling session, during which he told CJ that he had developed personal feelings for her. He later conducted a "mirror imaging examination" in her home, without a medical assistant present, in which CJ was required to wear only underwear as the appellant examined her in front of a mirror. The appellant began making telephone calls to CJ, usually at night, and discussed sexual topics. In particular, he would tell CJ his sexual desires for her and about his past sexual experiences. On one occasion, the appellant asked CJ to join him for a weekend in New York City, where he hoped to engage in sexual intercourse with her.

Several years prior to these events, the appellant was stationed at the Navy base in Rota, Spain. During this time, while serving as a psychiatrist at the base mental health clinic, he developed a sexual relationship with his secretary, LD, the wife of a Navy enlisted man. The appellant began by giving LD informal counseling sessions relating to difficulties she was having in her marriage. The sessions eventually led to an intensely physical relationship involving kissing and hugging. After LD left her husband and returned to the United States, the appellant arranged to meet her one weekend at a hotel in New York City, where they engaged in sexual intercourse. He later broke off the relationship after being warned in a telephone call from LD's therapist.

During the presentencing hearing, the appellant

produced 15 witnesses and extensive documentary evidence attesting to his good character, leadership in the community as a deacon of his church, and 30 years of military service. He also made an extensive unsworn statement, providing details of his career and family, and apologizing to the victims and their families.

We have considered the extensive evidence of the appellant's good character and service to this country. We also note the extremely serious nature of his offenses. An appropriate sentence results from an "individualized consideration" of the nature and seriousness of the offense and the character of the accused. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Taking all of these factors into consideration, we find the sentence, including the dismissal, fully appropriate for this offender and his offenses. To grant sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

Application of *Lawrence v. Texas*

The appellant contends that his conviction for divers acts of sodomy with SSgt R should be set aside and dismissed as a violation of his constitutional right to privacy, pursuant to the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). We disagree.

Whether the appellant's conviction for consensual

sodomy must be set aside in light of *Lawrence* is a constitutional question we review de novo. *United States v. Marcum*, 60 M.J. 198, 202 (C.A.A.F. 2004)(citing *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964)).

In *Lawrence*, the United States Supreme Court found a constitutionally protected liberty interest in consensual sodomy between adults, under some circumstances. In *Marcum*, our superior Court found that *Lawrence* applies to the military and adopted a three-part framework for determining whether Article 125, UCMJ, is constitutional as applied to the facts of a given case. The test requires three questions:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Id. at 206-07 (internal citations omitted).

As to the first question, we will assume that the

appellant's sexual acts at issue were both private and consensual.[1]

Regarding the second question, however, we find the appellant's conduct is specifically excepted from the liberty interest articulated in *Lawrence*. That is, the appellant engaged in divers acts of sodomy with a patient who was dependent on the appellant for critical psychiatric treatment for a diagnosed panic disorder. The Supreme Court specifically excepted from the *Lawrence* liberty interest "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." 539 U.S. at 578. We are convinced that SSgt R's dependence on the appellant for treatment for her panic disorder created just such a situation.

Our view is bolstered by the Government's expert witness, Dr. T. Gutheil, who testified that the therapist-patient relationship creates a powerful bond that can easily be exploited. He testified: "Anyone who offers help with a panic disorder really holds that patient hostage, because it's so unpleasant and so uncomfortable and so frightening that anyone who offers you that you're going to help with this, really has an amazing grip on you because of how distressing it is." Record at 191. Moreover, the appellant stipulated that he "diagnosed her as a sex addict," and testified that she "displayed

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[1] We need not decide today whether sexual activity that occurs in an individual office in a military hospital is "private."

behaviors of a sexual nature that were addictive in quality." Prosecution Exhibit 1 at 1; Record at 56. Dr. Gutheil testified that, while there is no formal diagnosis for sexual addiction, "individuals can engage compulsively in sexual behavior." *Id.* at 191. Because the therapist-patient relationship in this case created a situation in which "consent might not easily be refused," we find that Article 125, UCMJ, is not unconstitutional as applied to the appellant's case.

Finally, as to the third question in the *Marcum* analysis, it is clear that this case involves factors that affect the nature and reach of the *Lawrence* liberty interest. Specifically, the appellant's repeated acts of sodomy with SSgt R served as part of the factual predicate for his conviction for fraternization with a married enlisted person. The appellant admitted during the providence inquiry that, under the circumstances, this conduct was prejudicial to good order and discipline and of a nature to discredit the armed forces. We agree with his assessment, and note the appellant's predatory conduct as a Navy captain and director of clinical services at the Naval Hospital against the interests of both a married enlisted patient and her spouse would inevitably undermine both good order and discipline, as well as the reputation of the armed forces in the surrounding community.

We conclude that the appellant's repeated acts of sodomy constituted conduct of a type specifically excepted from the *Lawrence* liberty interest. They also

implicated military-specific interests that warranted his prosecution by court-martial. *See United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004), *cert. denied*, ___ U.S. ___, 125 S.Ct. 1682 (2005); *United States v. Christian*, 61 M.J. 560, 563-64 (N.M.Ct.Crim.App. 2005).

Conclusion

We have considered but find without merit the appellant's third assignment of error, essentially contending that the wording of the adjudged letter of reprimand calls into question the convening authority's impartiality in the conduct of his post-trial duties. Although not assigned as error, we also note that enclosure (9) of the appellant's clemency request of 30 May 2001 is missing from the record. This attachment to the post-trial submission was not evidence admitted at court-martial, and the appellant raises no issues as a result of its omission. We find that the missing attachment to the post-trial submission in this case is not a "substantial" omission from the record of trial and does not render the record incomplete within the meaning of Article 54, UCMJ. *See United States v. Henry*, 53 M.J. 108 (C.A.A.F. 2000); *United States v. McCullah*, 11 M.J. 234 (C.M.A. 1981).

We therefore affirm the findings and the sentence, as

approved by the convening authority.

Senior Judge CARVER and Judge THOMPSON concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix KK

UNITED STATES, Appellee

v.

Franklin OWENS, Jr.
Aviation Boatswain's Mate (Launching and Recovery Equipment)
First Class (E-6), U.S. Navy, Appellant

No. 05-0694/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200100297

September 11, 2006, Ordered

Counsel for Appellant: LT Richard H. McWilliams, JAGC, USNR.

Counsel for Appellee: LT Jessica M. Hudson, JAGC, USNR.

On consideration of the granted issue, in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006),

assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in United States v. Moreno, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix LL

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER D.A. WAGNER R.W. REDCLIFF

UNITED STATES

v.

Franklin OWENS, Jr.
Aviation Boatswain's Mate (Launching and Recovery Equipment)
First Class (E-6), U.S. Navy

NMCCA 200100297 Decided 17 June 2005

Sentence adjudged 21 June 2000. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS GEORGE WASHINGTON (CVN 73).

LCDR ROBERT EVANS, JAGC, USNR, Appellate Defense Counsel

LT CHRISTOPHER BURRIS, JAGC, USNR, Appellate

Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

REDCLIFF, Judge:

A special court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of assault consummated by a battery, unlawful entry, and communicating indecent language, in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934.[1] The members sentenced the appellant to a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have carefully considered the record of trial, the appellant's eleven assignments of error,[2] and the

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[1] The appellant was also convicted by the members of disorderly conduct, in violation of Article 134, UCMJ. This offense was dismissed by the military judge prior to sentencing.

[2] The appellant has raised the following assignments of error (AOEs):

> I. THE CONVENING AUTHORITY WAS DISQUALIFIED BY HIS PERSONAL FEELINGS ABOUT THE OUTCOME OF THE CASE AND BY THE BIASED ADVICE OF HIS JUDGE

ADVOCATE.

II. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S PRETRIAL MOTION TO DISMISS ON GROUNDS OF DUE PROCESS, EQUAL PROTECTION, AND DOUBLE JEOPARDY.

III. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDECENT LANGUAGE SPECIFICATION FOR FAILURE TO STATE AN OFFENSE.

IV. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS AA H[]'S TESTIMONY.

V. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO EXCLUDE EVIDENCE OF OTHER ACTS.

VI. THE COURT WAS IMPROPERLY INFLUENCED BY OJAG'S DECISION AUTHORIZING ACTION AGAINST APPELLANT.

VII. THE MILITARY JUDGE ALLOWED THE GOVERNMENT TO MANIPULATE THE SELECTION OF THE PANEL.

VIII. THE COURT'S INSTRUCTION DID NOT CURE THE GOVERNMENT'S IMPROPER CLOSING ARGUMENT.

IX. THE CONVENING AUTHORITY'S ACTION INCORRECTLY REPORTS THE RESULTS OF TRIAL.

X. THE SENTENCE CANNOT BE APPROVED, AS THE GOVERNMENT HAS FAILED TO INCLUDE A COMPLETE ARTICLE 32, UCMJ, REPORT IN THE RECORD OF TRIAL.

XI. THERE IS INSUFFICIENT FACTUAL AND LEGAL SUPPORT FOR THE FINDINGS OF GUILTY, AS AN AFRICAN-AMERICAN MALE WHO WAS RAISED IN THE CITY OF CHICAGO, ILLINOIS, WOULD NOT REFER TO A WOMAN AS A "WHITE SLUT" OR A "TEASE." *See record at 155.* IF HE WERE DIRECTING DERISIVE COMMENTS TO A WOMAN, APPELLANT WOULD NOT USE THAT TYPE OF SLANG, THUS, AA H[]'S IDENTIFICATION OF APPELLANT AS THE PERPETRATOR WAS AN OBVIOUS FABRICATION.

For the sake of convenience and clarity,

Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *See* Arts. 59(a) and 66(c), UCMJ.

Background

At about 0930 on the morning of 3 January 2000, the appellant, a first class petty officer, went uninvited to the off-base apartment of a female shipmate, Airman Apprentice (AA) "H." After being denied entry by AA H, the appellant forced his way into her apartment. He screamed at her, calling her a "bitch," a "white slut," and a "tease," and said that he hadn't had sex in a month-and-a-half. He then struck her repeatedly with his hands, causing her to fall down. As she lay on the floor, the appellant got on top of her, hitting and scratching her. When she tried to get up, he pushed her head forcefully against the floor. Then he pulled out an unknown metal object (described by AA H as possibly a nail file or nail clippers), pushed up her shirt, and scratched AA H's face and stomach areas with this object. The appellant then left the apartment.

After the attack, AA H contacted a friend, who drove her to her command, the USS GEORGE WASHINGTON (CVN 73). An examination of AA H by the ship's medical personnel disclosed numerous fresh bruises and cuts, but

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we will address several AOEs out of order.

no serious injuries. Although she was initially reluctant to discuss the assault, later that day AA H identified the appellant as her attacker.

The case was initially prosecuted by civilian authorities in Norfolk, Virginia. The case was charged as a misdemeanor, and no prosecutor was assigned to the case. After AA H testified, the state court judge dismissed the case for lack of jurisdiction--on the motion of the appellant's civilian defense counsel--apparently because AA H failed to state where the assault had occurred and also failed to make an in-court identification of the appellant as her assailant.

After the conclusion of the state court proceeding, the appellant's command ordered the charges investigated pursuant to Article 32, UCMJ. The investigating officer recommended that the charges be disposed of by special court-martial. As required by section 0124 of the Manual of the Judge Advocate General,[3] the command judge advocate then requested permission from the Judge Advocate General of the Navy to refer the charges to a court-martial. The package forwarded to the Judge Advocate General included letters from the appellant's defense counsel, the assigned trial counsel, the convening authority, and the command judge advocate. Based upon this input, the Judge Advocate General approved the request, specifically finding that "the interests of justice

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[3] Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7c § 0124 (CH-3, 27 Jul 1998).

and discipline require further action under the Uniform Code of Military Justice against ABE1 Owens." (Appellate Exhibit XXIX at 1).

BIAS OF THE CONVENING AUTHORITY AND THE COMMAND JUDGE ADVOCATE

The appellant's first assignment of error contends that both the convening authority and his command judge advocate were biased against the appellant, and that this bias disqualified the convening authority from convening the court-martial. We disagree.

As evidence of this purported bias, the appellant points to the following remarks contained in the letters submitted to the Judge Advocate General:

1) The command judge advocate explained that the ship's Naval Criminal Investigative Service (NCIS) special agent initially assumed responsibility for this case, and, without consulting with the command, told AA H to file a complaint with the civilian authorities. When the command judge advocate learned of the assault, "I immediately directed our Security Division conduct a full investigation into what I considered a potentially serious crime." (Appellate Exhibit XXIX at 3.)

2) When the civilian authorities assumed jurisdiction, the command judge advocate "continued processing our investigation to preserve the information for any subsequent action the command might have desired." (Appellate Exhibit XXIX at 3).

3) After the civilian authorities brought charges, the command decided not to postpone any further decisions about the case until after the civilian charges had been resolved. The command judge advocate commented: "At this point in the process, I felt, even though we were dealing with a serious assault, the commonwealth attorney's office would handle it sufficiently." (Appellate Exhibit XXIX at 3).

4) While the ship began to prepare for an upcoming deployment, the command judge advocate noted that: "My office continued to track the case and coordinated with the civilian courts to ensure the victim and accused would be available for appearances during underway periods." (Appellate Exhibit XXIX
at 3.)

5) The command judge advocate's letter then explained that no prosecutor was assigned to the case (a fact of which he was not aware until after the conclusion of the proceedings), and the case was dismissed on jurisdictional grounds. The letter goes on to comment: "I am confident, had the government's interests been properly represented by a prosecutor there would have been a different result. In light of the outcome, I discussed options with the Commanding Officer and he decided to refer the case to an Article 32 Investigation." (Appellate Exhibit XXIX at 3-4).

6) The convening authority provided a brief endorsement to the defense counsel's letter to the Judge Advocate General. In this endorsement, he challenges an

assertion by the appellant's counsel that the command had allowed the civilian authorities to handle the case, pointing out that the latter had assumed jurisdiction and that he had merely awaited disposition of the offenses as required by policy issued by higher authority. He then commented: "I believed at the time, the incident would be fairly adjudicated in the civilian court system." (Appellate Exhibit XXIX at 5).

On appeal, the appellant asserts that these remarks show that both the command judge advocate and the convening authority had more than an official interest in his case, and that this disqualified the convening authority from convening the court-martial. The appellant did not raise this issue at trial.

Article 23(b), UCMJ, prohibits an officer from convening a special court-martial in which he is also an accuser. Instead, such an officer must refer the case to higher authority, and should advise the superior authority of his disqualification. Art. 23(b), UCMJ; *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). Article 1(9), UCMJ, defines an "accuser" as:

> a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

A staff judge advocate can be similarly disqualified from participating in the review of a case if he has more than an

official interest in the case. Art. 6(c), UCMJ; *United States v. Sorrell*, 47 M.J. 432, 433 (C.A.A.F. 1998).

However, the disqualification of a convening authority as an accuser under Article 23(b), UCMJ, is not jurisdictional, and the error must be raised in the trial court to be preserved for appeal, absent plain error. *United States v. Shiner*, 40 M.J. 155, 157 (C.M.A. 1994).[1] After considering the challenged comments and actions discussed above, we find no error, let alone "plain error." Thus, no relief is appropriate.

On this record, the evidence does not establish that either the command judge advocate or the convening authority had "other than an official interest" in this case. In context, the remarks cited by the appellant appear to reflect these officers' official interest in seeing that justice was done and that good order and discipline was preserved, as well as a perception that these interests may not have been adequately protected by the civilian proceeding. We perceive no improper action or improper motives in their written remarks, and we will not impute improper motives to the command judge advocate or the convening authority on the basis of the evidence presented in this record. We conclude that this assignment of error is without merit.

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[1] The majority in *Shiner* held that the failure to raise the error in the trial court waives the error. However, Judge Wiss, in his concurring opinion, declined to endorse the doctrine of waiver in such cases, preferring to test the error for prejudice.

DOUBLE JEOPARDY, DUE PROCESS, AND EQUAL PROTECTION

In his second assignment of error, the appellant asserts that his prosecution and punishment in a military court-martial after his acquittal in Virginia Commonwealth criminal court is a violation of his double jeopardy and due process rights under the Fifth Amendment, and his Fourteenth Amendment right to equal protection of the law. The appellant raised each of these contentions at trial, and now reasserts them before this court. We concur with the ruling of the military judge that the appellant's rights to due process and equal protection, as well as his rights against double jeopardy, were not abridged via trial by court-martial.

The law is well-settled that multiple prosecutions of an accused by different sovereigns -- in this case, the Commonwealth of Virginia and the United States -- does not violate either double jeopardy or due process. *Bartkus v. Illinois*, 359 U.S. 121 (1959); *United States v. Stokes*, 12 M.J. 229 (C.M.A. 1982). The continuing vitality of this "dual sovereignty doctrine" has recently been reaffirmed by the United States Supreme Court in *United States v. Lara*, 541 U.S. 193 (2004).

The appellant claims that the Supreme Court has carved out an exception to the dual sovereignty doctrine in *Bartkus* in that "federal and state authorities may not manipulate a system to achieve the equivalent of a second prosecution," and contends that his prosecution before a court-martial constitutes such a case. (Appellate Exhibit

VIII at 6). Contrary to the appellant's contention, we find no such language or support for his position in *Bartkus*. The Supreme Court did state in *Bartkus* that "at some point the cruelty of harassment by multiple prosecutions by a State would offend due process. . . ." *Bartkus*, 359 U.S. at 127. However, this is not such a case. And even if the appellant was correct that a "manipulation" exception to the dual sovereignty doctrine does or should exist, we do not find that such an exception would apply in this case on the record before us. Instead, the evidence of record establishes that the military authorities prosecuted the appellant because they believed that Virginia's civilian authorities failed to protect important military's interests.

The appellant also asserts that the multiple prosecutions in this case deprived him of equal protection of the law, because if the appellant had been a civilian – or a service member serving in a foreign country – he would have been protected against the multiple prosecutions by double jeopardy or by a status of forces agreement (SOFA). However, the appellant ignores that he could be prosecuted twice because his offense violated both State and military law. He is therefore in a wholly different situation from a civilian who violates only State law. The resulting "disparity of treatment" cited by the appellant is rationally related to the military's interest in maintaining good order and discipline among its service members – a consideration entirely absent from the case of a civilian. Similarly, the disparate treatment of the appellant from that of a service member who might be protected from multiple prosecution under a SOFA finds a rational basis in the Government's need to protect its service members who are

stationed in foreign countries and to maintain positive relations with those foreign countries.

Finally, there is no evidence, and the appellant does not claim, that he was singled out for multiple prosecutions contrary to military policy or practice. Section 0124 of the Navy's JAGMAN sets forth a procedure which permits multiple prosecutions in some cases, and that procedure was followed in this case. Simply put, the appellant has not averred or proven that he was treated differently in this regard than other Sailors similarly situated. We, therefore, find no violation of equal protection in this case and conclude that this assignment of error is without merit.

UNLAWFUL COMMAND INFLUENCE

In his sixth assignment of error, the appellant claims that the military judge, in ruling on the appellant's double jeopardy and due process claims, as discussed above, was improperly influenced by the decision of the Judge Advocate General to permit a court-martial pursuant to the provisions of JAGMAN § 0124. In support of this contention, the appellant points to the following comment by the military judge during consideration of the motion:

> Don't get me wrong. I'm not trying to — I'm not trying to supplant this court's interpretation for the Judge Advocate General of the Navy's decision, but just rather, what was the process. That's all I'm looking to see.

Record at 13. The appellant contends that this remark demonstrates that "the military judge gave undue weight to the Judge Advocate General's decision authorizing the court-martial, and he allowed that decision to intrude upon and influence his rulings on Appellant's pretrial motions." Appellant's Brief at 13.

We recognize that unlawful command influence is the "mortal enemy" of military justice, and therefore cannot be tolerated. *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998)(quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)). We also recognize that military judges can be the targets of unlawful command influence. *United States v. Mabe*, 33 M.J. 200, 205 (C.M.A. 1991).

However, the initial burden is upon the defense to produce "some evidence" in support of a contention of unlawful command influence; mere allegation or suspicion is not sufficient. *United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003). We conclude that the appellant has failed to carry this burden.

Taken in its proper context, we are convinced that the military judge's remark does not reflect unlawful command influence. The remark occurred during a discussion of the due process aspects of the appellant's motion. The Government had presented the letter from the Judge Advocate General of the Navy authorizing prosecution of the appellant, and this letter referenced a letter from the convening authority. The military judge simply asked to see a copy of the convening authority's letter, pointing out that it could be relevant to the court's determination of the

appellant's procedural due process claim. The trial counsel apparently misinterpreted the military judge's request as expressing an intention to reconsider the wisdom of the Judge Advocate General's decision, and responded by questioning the judge's authority to do so. This was the context of the military judge's remark quoted above. It is clear to us that this remark was made, not as an indication of any type of unlawful command influence, actual or apparent, but merely as a clarification of the military judge's motive for requesting to review the documents considered by the Judge Advocate General.[1]

Thus, we perceive nothing improper in the actions of the military judge or the Judge Advocate General in this case, and conclude that the appellant's claim of unlawful command influence is without any evidentiary support. This assignment of error is without merit.

FAILURE TO STATE THE OFFENSE OF INDECENT LANGUAGE

In his third assignment of error, the appellant contends that the trial court erred by denying his motion to dismiss Specification 2 of Charge I, which alleges that the appellant communicated indecent language by calling AA H a "white slut." [2] At trial, and now on appeal, the

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[1] The military judge was subsequently provided with those documents prior to ruling on the appellant's motion.

[2] Specification 2 of Charge I reads as follows:

appellant urges that the specification fails to state an offense because the language used was not indecent under the circumstances, and because the appellant's conduct was neither prejudicial to good order and discipline nor service-discrediting. We disagree.

We begin by noting at the outset that the nature of the appellant's argument seems more consistent with an attack on the sufficiency of the evidence than on the sufficiency of the specification. In any event, since we have a duty to affirm only those findings that we determine to be correct in law and fact (Art. 66(c), UCMJ), we will consider the sufficiency of both the specification and the evidence. [1]

> In that Aviation Boatswain's Mate (Launching and Recovery Equipment) First Class Franklin Owens, Jr., U.S. Navy, USS George Washington (sic), on active duty, did, at or near Norfolk, Virginia, on or about 3 January 2000, orally communicate to Airman Apprentice H[], U.S. Navy, certain indecent language, to wit: "You white slut," or words to that effect.

[1] The appellant's eleventh assignment of error also challenges the sufficiency of the evidence in support of Specification 2 of Charge I, in these terms:

> THERE IS INSUFFICIENT FACTUAL AND LEGAL SUPPORT FOR THE FINDINGS OF GUILTY, AS AN AFRICAN-AMERICAN MALE WHO WAS RAISED IN THE CITY OF

"A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL (2000 ed.). The specification must be sufficient to "give the accused notice and protect him against double jeopardy." *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994).

The elements of the offense of communicating indecent language are:

> (1) that the accused orally or in writing communicated to another person certain language;
>
> (2) that such language was indecent; and

- CHICAGO, ILLINOIS, WOULD NOT REFER TO A WOMAN AS A "WHITE SLUT" OR A "TEASE." *See Record at 155.* IF HE WERE DIRECTING DERISIVE COMMENTS TO A WOMAN, APPELLANT WOULD NOT USE THAT TYPE OF SLANG, THUS, AA H[]'S IDENTIFICATION OF APPELLANT AS THE PERPETRATOR WAS AN OBVIOUS FABRICATION.

The appellant's contention in this regard is unsupported by the record, is clearly superfluous, and does not merit further discussion.

> (3) that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 896. Language is "indecent" if it is:

> grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

Id., ¶ 89c. "Whether or not specific language is 'indecent' for purposes of this offense is a question of fact and largely depends on the context in which it is uttered." *United States v. Caver*, 41 M.J. 556, 559 (N.M.Ct.Crim.App. 1994)(footnote omitted). Thus, profanity-laced language uttered by an accused while being apprehended and handcuffed, but which clearly had no sexual connotations, was not deemed "indecent." *United States v. Brinson*, 49 M.J. 360 (C.A.A.F. 1998). On the other hand, an adult male's request to climb into bed with his 15-year-old step-daughter was held to be indecent under the circumstances. *United States v. French*, 31 M.J. 57 (C.M.A. 1990).

Turning now to Specification 2 of Charge I, we find that it does state an offense. All of the elements of the offense are stated either expressly or by fair implication, and the specification provides the appellant with adequate notice of the charge as well as protection against double jeopardy.

We also find that under the facts of this case, the evidence was legally and factually sufficient to establish the offense of indecent language. The evidence shows that the appellant, a married E-6, went uninvited to the apartment of an E-2 whom he appears to have had a romantic interest–an interest which she did not reciprocate. He then forced his way into her apartment, became verbally abusive, and attacked her physically. The term used by the appellant, "slut," commonly refers to a prostitute or a woman of loose morals, and certainly carries sexual connotations. In addition, the appellant's remark, made in conjunction with the unprovoked attack, that he had not had sex for a month-and-a-half, and his lifting of the victim's shirt to expose her abdomen, add sexual connotations to his use of the term, "slut."

The facts of this case are analogous to those in *Caver*, in which this Court held that the use of the term, "bitch," was indecent when a male E-5 used the term toward a female E-3 to imply that she "would sleep around." *Caver*, 41 M.J. at 560-61. We stated in *Caver* that:

> The language was part and parcel of a violent disturbance in a military barracks. It was communicated during an abusive, degrading episode. [citation omitted] It was

> not innocuous. It was clearly calculated to offend, shock, and carry an indecent message. [citation omitted] Applying community standards, the language was grossly offensive to modesty, decency, and propriety because of its vulgar and disgusting nature. The use of the word employed in this case might not constitute an offense under other circumstances. However, considering the factors set forth in the record, including the context of the utterance, the intent and effect of the communication, and applying community standards, we conclude in this case the language was "indecent" within the meaning of the Manual for Courts-Martial.

Id. (footnote omitted).

Many of the factors that we considered relevant in *Caver* are also present here, such as the disparity in rank between the appellant and the victim, the abusive and degrading context in which the remark was made, and the sexual implications of the language used.

We find that the members' finding of guilty as to Specification 2 of Charge I was correct in law and fact. This assignment of error, therefore, is without merit.

PEREMPTORY CHALLENGES

The appellant's seventh assignment of error alleges that

the military judge erred by allowing the trial counsel to exercise the Government's peremptory challenge after the trial defense counsel had exercised a peremptory challenge. We find no prejudice to the appellant from the process employed by the military judge and, therefore, decline to grant relief based on this assignment of error.

Six members, including three enlisted members, were detailed to the appellant's court-martial by the convening authority. Upon completion of voir dire, the military judge granted a defense challenge for cause of one of the enlisted members. Record at 132. The government peremptorily challenged one of the officer members, LCDR Koach, and the appellant peremptorily challenged another of the officer members, LT Essenmacher. Record at 132. This left a panel of one officer and two enlisted members.

The appellant's counsel did not initially object to the Government's peremptory challenge of LCDR Koach. However, upon completion of the challenges, the military judge asked, "Defense, did you have any objections against the peremptory challenge by the government?" Record at 133. The assistant defense counsel took advantage of this opportunity by entering an untimely objection to the Government's peremptory challenge on the basis that the Government had stricken a person who appeared to favor leniency in the appellant's case. Before the military judge could rule on

the defense objection,[1] the Government voluntarily withdrew its peremptory challenge of LCDR Koach, to which the appellant made no objection. Record at 133.

Based on the Government's withdrawal of its challenge, the military judge reinstated LCDR Koach to the panel, and then gave the Government an opportunity to exercise its peremptory challenge against another member. The appellant objected to this procedure, pointing out that the military judge was effectively allowing the Government to exercise its peremptory challenge after the defense. Record at 134. The military judge overruled the defense objection, and the Government peremptorily challenged one of the remaining enlisted members.[2]

"Ordinarily," the government's peremptory challenge must be made and decided prior to the defense peremptory challenge. R.C.M. 912(g)(1); *United States v. Newson*, 29 M.J. 17, 20 (C.M.A. 1989); *see also* Art. 41(a), UCMJ. The military judge cannot change this procedure "without a sound basis." *Newson,* 29 M.J. at 19.

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[1] The military judge later stated on the record that he probably would have overruled the defense objection, had not the Government promptly withdrawn its challenge to LCDR Koach.

[2] This left a panel consisting of two officers, including LCDR Koach, and one enlisted member.

On the facts of this case, we conclude that the military judge had a sound basis for departing from the "ordinary" procedure. This departure was prompted by the appellant's untimely objection to the Government's peremptory challenge of LCDR Koach. That objection should have been made prior to the defense entering its peremptory challenge. If the defense had done so, the Government could have withdrawn its challenge—or the military judge could have ruled on the defense objection—prior to the defense exercising its peremptory challenge. In either approach, the prosecution would have been able to assert an alternate peremptory challenge before the defense made its peremptory challenge.

However, even if we were to decide that the military judge committed error in the approach he took, that error would not result in relief for the appellant unless the error materially prejudiced his substantial rights. Art. 59(a), UCMJ; *Newson*, 29 M.J. at 21. We find no such prejudice. The appellant obtained the relief he initially desired, which was to have LCDR Koach serve as a member of his panel. As was the case in *Newson*, "[t]here is no reason to suspect that a different mix of members would have produced results more favorable to appellant." *Newson*, 29 M.J. at 21. We find it odd indeed that the appellant now asserts as error a process prompted by his own trial defense counsel's tardy objection to the prosecution's exercise of its peremptory challenge, especially in view of the fact that the member the defense desired to retain on the panel was actually retained.

We conclude that this assignment of error lacks merit and decline to grant relief.

REMAINING ASSIGNMENTS OF ERROR

We have also carefully considered the appellant's remaining assignments of error, including his contention that the record of trial is incomplete (because it does not contain a verbatim Article 32, UCMJ, investigation), that the military judge should have excluded the victim's testimony, that the military judge should have granted a mistrial based on the trial counsel's closing argument, and that the military judge erred by admitting the appellant's uncharged misconduct. We find no merit in these contentions and decline to provide the requested relief.

We do concur with the appellant that his court-martial promulgating order is inaccurate. Specifically, the court-martial order fails to state that the military judge dismissed Additional Charge II and its single specification prior to sentencing. While we find no prejudice to the appellant from this scrivener's error, he is entitled to correction of his official records. Art. 59(a), UCMJ; *United States v. Glover*, 57 M.J. 696, 697-98 (N.M.Ct.Crim.App. 2002). Thus, we will provide appropriate relief in our decretal paragraph.

CONCLUSION

Accordingly, we affirm the findings and sentence as

approved by the convening authority. We direct that the supplement court-martial promulgating order reflect that Additional Charge II and its single specification were dismissed by the military judge.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix MM

UNITED STATES, Appellee

v.

Jason A. PHILLIPS
Lance Corporal (E-3), U.S. Marine Corps

No. 06-0306/MC

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200300969

September 11, 2006, Ordered

Counsel for Appellant: LT Brian L. Mizer.

Counsel for Appellee: LT Mark H. Herrington, JAGC, USNR.

On consideration of the granted issue in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in *United States v. Moreno*, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix NN

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

Charles Wm. DORMAN C.A. PRICE R.H. CAUTHEN

UNITED STATES

v.

Jason A. PHILLIPS
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200300969 Decided 21 November 2005

Sentence adjudged 10 April 2002. Military Judge: F.A. Delzompo. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Air Ground Task Force Training Command, Marine Corps Air Ground Combat Center, Twentynine Palms, CA.

LT JENNIE L. GOLDSMITH, JAGC, USNR, Appellate Defense Counsel

LT MARK H. HERRINGTON, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

CAUTHEN, Judge:

The appellant stands convicted of various offenses by a general court-martial. Pursuant to his pleas, he was convicted of conspiracy to use marijuana, conspiracy to distribute ketamine, six specifications of wrongful use of various controlled substances, five specifications of wrongful distribution of various controlled substances, and wrongful manufacture of ketamine with the intent to distribute, in violation of Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a. Contrary to his pleas, he was convicted by officer members of wrongful communication of a threat to kill, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The members sentenced the appellant to a dishonorable discharge and confinement for 12 years. The convening authority approved the sentence as adjudged. There was no pretrial agreement.

After carefully considering the record of trial, the appellant's assignments of error[1], and the Government's

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[1] I. APPELLANT SUFFERED UNLAWFUL PRETRIAL PUNISHMENT WHEN MEMBERS OF HIS COMMAND POSTED HIS PICTURE AROUND THE COMMAND WITH LARGE BLOCK LETTERS

response, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

In January 2001, the appellant was convicted at special court-martial of, among other offenses, use of lysergic acid diethylamide (LSD) and marijuana. After his release from the brig in March 2001, he was assigned to the Marine Processing Platoon (MPP) at the Marine Corps Communication Electronics School at Twentynine Palms, California. Very soon thereafter, the

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ABOVE HIS NAME STATING "BEWARE."

II. A DISHONORABLE DISCHARGE AND SENTENCE OF TWELVE YEARS CONFINEMENT IS A HIGHLY DISPARATE AND INAPPROPRIATELY SEVERE PUNISHMENT COMPARED TO CO-OFFENDERS IN CLOSELY RELATED CASES WHO COMMITTED THE SAME OR SIMILAR ACTS YET RECEIVED A LESSER PUNISHMENT.

III. IN LIGHT OF THE UNREASONABLE AND UNEXPLAINED POST-TRIAL DELAY OF 399 DAYS FROM THE DATE OF SENTENCING, THIS COURT SHOULD PROVIDE REMEDIAL RELIEF PURSUANT TO ITS POWERS UNDER ARTICLE 66, UCMJ.

appellant was once again involved in drug abuse.

In January of 2001, the Naval Criminal Investigative Service (NCIS) began Operation Desert Fox, an investigation into drug distribution and use at the Marine Air Ground Task Force Training Command, Twentynine Palms, California. As part of that investigation, NCIS Special Agent AF worked undercover. AF bought drugs from Private B. G. Asher, USMC. Pvt Asher soon became a cooperating witness for the investigation, introducing AF to many other Marines, including the appellant. AF witnessed the appellant using drugs, distributing drugs, manufacturing drugs, and conspiring to manufacture and distribute drugs.

On or about 9 April 2001, "posters" bearing the names and photographs of several Marines, including the appellant, were posted in various places around the command. These posters warned Marines to "BEWARE" of those pictured; that they were prohibited by instruction to be around certain barracks; and, that if seen there, they were to be reported. The posters were up for about one day until the Executive Officer was briefed about them. He ordered that the posters be taken down and disposed of immediately.

The investigation concluded on 25/26 April 2001 with the apprehension of multiple persons, including the appellant. All of those apprehended were sent for urinalysis on the morning of 26 April. While waiting in the hallway, the appellant stated, "I don't care if it's five, ten or fifteen years. When I get out, I'm going to find

Asher and kill him (or words to that effect)." Charges were initially preferred against the appellant on 15 May 2001.

Article 13 Pretrial Punishment

In his first assignment of error, the appellant asserts that he suffered unlawful pretrial punishment when his picture was posted by the command with the word "BEWARE" above his name. We decline to grant relief on this basis.

During the Government's case on sentencing, the appellant's counsel questioned two witnesses about Defense Exhibit B, a composite exhibit consisting of ten "posters" showing the names and photographs of Marines assigned to the MPP, including the appellant, under the word "BEWARE" in big block letters at the top, all dated 9 April 2001. Record at 322-23; 339.

During the defense's case on sentencing, Defense Exhibit B was offered and admitted, and the appellant's counsel questioned two other witnesses about the posters. Record at 341; 350.

During the appellant's unsworn statement, the following colloquy took place between the appellant and his civilian counsel:

> Q. . . . Now, you were assigned to MPP when you came out of the brig. Correct?
> A. Yes, sir.

Q. Okay. And that's Building 1641?
A. Yes, sir.

Q. And there were other people there with you. Correct?
A. Yes, sir.

Q. And the members now have got – or will look at some posters. Can you talk about – can you tell us what those posters are about?
A. Corporal Wolf, who was in charge of us at the time, came in one morning and said that Major King wanted our picture for our personal files. We told him, No, we don't want to give him a picture. And he promised us that these are for his personal files, that nobody is going to see these. We told him, Okay, we'll take the pictures. They took the pictures; and the following day, they were posted on base and in the morning paper to stay away from us because we were in trouble and they didn't want us to congregate with anybody. They kind of wanted to keep us together at MPP. That way, we didn't associate with nobody else.

Q. Okay. Now we don't know specifically if Major King said that. That was what –

A. That's what I was told. I don't know specifically.

Q. That was Corporal Wolf?
A. Yes.

Q. And those posters were up for a period of time in all the barracks – right? – on base.
A. As far as I know, yes.

Q. Okay. And at some point in time, a complaint was made?
A. Yes. We went to legal to see what type of legal action we could take because we didn't feel that it was right at all to keep us separated and segregated from anybody else. We were human too, we thought.

Q. And the posters being on base?
A. Yes.

Q. So the posters then were restricted to just the MCCES barracks. Is that right?
A. Yes. They were just up in the school, Headquarters Company, the duty office. They were posted.

Record at 361-62.

After the appellant's unsworn statement, the defense

rested. During an Article 39(a), UCMJ, session, the following colloquy took place between the Military Judge, civilian counsel, and the appellant:

> MJ: . . . I just wanted to take up one matter. I'm assuming for tactical reasons, Mr. Cave, that you did not bring an Article 13 motion alleging illegal pretrial punishment in relation to these posters. Is that right?
>
> CC: Yes. The issue has been discussed, not just in this case, but in other cases. We feel that it's something that ultimately would go to the members based on their – on my personal legal research on the issue.
>
> MJ: Right.
>
> CC: And my understanding of what – their understanding was and what the facts may be.
>
> MJ: All right. So you deliberately chose not to bring an Article 13 –
>
> CC: I knew I was probably waiving off an Article 13 issue, yes.
>
> MJ: Fair enough. And you've discussed that with your client?

CC: Yes, we did.

MJ: You understand what I'm asking – what I'm talking to your counsel about here, Private Phillips?

ACC: Yes, sir.

MJ: Do you understand that this issue with these posters that were put up and are now before the members, you certainly had it within your power, if you wanted to, to seek some kind of judicial credit because of that? Do you understand that?

ACC: Yes, sir.

MJ: And you chose not to do that?

ACC: Yes, sir.

Record at 364-65.

Article 13, UCMJ, provides:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more

> rigorous than the circumstances required to insure his presence [at trial]. . . .

Article 13 prohibits two things: (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial, i.e., illegal pretrial punishment, and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial, i.e., illegal pretrial confinement. *United States v. Fricke,* 53 M.J. 149, 154 (C.A.A.F. 2000)(citing *United States v. McCarthy,* 47 M.J. 162, 165 (C.A.A.F. 1997)). If an accused, or appellant, can demonstrate that either existed, he or she is entitled to sentence relief. *United States v. Mosby,* 56 M.J. 309, 310 (C.A.A.F. 2002); RULE FOR COURTS-MARTIAL 305(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.)("additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances"); *see United States v. Suzuki,* 14 M.J. 491 (C.M.A. 1983).

However, given the representations of the civilian defense counsel and the appellant to the military judge, we hold that under R.C.M. 905(e), the appellant explicitly waived the issue. We note that under the case law in effect at the time of the appellant's trial, such an issue of pretrial punishment could be waived, but only by an "affirmative, fully developed waiver on the record." *United States v. Huffman*, 40 M.J. 225, 227 (C.M.A. 1994). Subsequent to the appellant's trial, our superior court overruled *Huffman* and established a

prospective rule focused on R.C.M. 905(e), forfeiture of the issue by failing to raise the issue at trial. *See United States v. Inong*, 58 M.J. 460, 464-65 (C.A.A.F. 2003). Whether the appellant's case is analyzed under *Huffman* or *Inong*, we conclude that the result is the same. In the final analysis, we see nothing in any of our superior court's decisions invalidating R.C.M. 905(e) as to this particular issue and conclude that this presidential rule controls.

The appellant also asserts that the failure of the military judge to *sua sponte* grant relief constitutes plain error. Appellant's Brief of 29 Oct 2004 at 8. "Plain error" requires that an error, in fact, exists; that it be plain or obvious; and that it materially prejudices the substantial rights of the appellant. *United States v. Finster,* 51 M.J. 185, 187 (C.A.A.F. 1999)(citing *United States v. Powell,* 49 M.J. 460, 463, 465 (C.A.A.F. 1998)); *see also United States v. Fuson*, 54 M.J. 523, 526 (N.M.Ct.Crim.App. 2000). The court invokes the plain error rule only in exceptional circumstances to avoid a miscarriage of justice. *United States v. Lowry*, 33 M.J. 1035, 1038 (N.M.C.M.R. 1991). Further, this Court has defined plain error as being so "particularly egregious" as to seriously affect the fairness or integrity of judicial proceedings and has indicated that plain error must be reviewed in the context of the whole record. *Id.*

The appellant contends that he suffered pretrial punishment by being humiliated and denounced as a criminal long before his trial ever took place. Appellant's Brief at 7. However, less than three months

before the appellant's poster was posted, the appellant had been convicted at a special court-martial of offenses including conspiracy, orders violations, unauthorized absence, and use of LSD and marijuana, and had been adjudged a bad-conduct discharge, confinement for six months, and reduction to pay grade E-1.

Article 13 requires that the alleged punishment occur *while being held for trial.* On 9 April, when the posters were posted, the appellant was not *being held for trial.* The appellant was not apprehended until 26 April. Charges were not preferred until 15 May. Based upon a review of the entire record, we find no plain error and conclude that the issue of pretrial punishment was waived.

Sentence Disparity and Appropriateness

In his second assignment of error, the appellant asserts that his sentence is inappropriately severe and highly disparate from the sentence of his co-offenders in closely related cases who committed the same or similar acts yet received a lesser punishment. He asks that we reassess his sentence and set aside his dishonorable discharge. We decline to grant relief on this basis.

To support his position, the appellant cites the cases of Private (Pvt) Tillinghast and Pvt Ryan, who participated with the appellant in drug use and distribution, and the case of Pvt W. E. Cathey, USMC.

Pvt Cathey was convicted of nine specifications of the

wrongful use of various controlled substances. He was sentenced to a bad-conduct discharge, confinement for 14 months, and reduction to pay grade E-1. The convening authority, suspended all confinement in excess of 180 days.

Pvt Ryan was convicted of conspiracy to wrongfully distribute ketamine, conspiracy to wrongfully use ketamine, three specifications of wrongful distribution of marijuana, wrongful manufacture of ketamine, wrongful use of ketamine, and assault. Pvt Ryan was sentenced to a dishonorable discharge, confinement for 112 months, total forfeiture of pay and allowances, and a fine of $5,000.00. The convening authority, suspended all confinement in excess of 48 months.

Pvt Tillinghast was convicted of conspiracy to wrongfully distribute ketamine, conspiracy to wrongfully use marijuana, conspiracy to wrongfully possess marijuana, three specifications of wrongful distribution of ketamine and marijuana, wrongful manufacture of ketamine, wrongful introduction of marijuana, and six specifications of wrongful use of ketamine and marijuana. Pvt Tillinghast was sentenced to a dishonorable discharge, confinement for 12 years, and forfeiture of all pay and allowances. The convening authority, suspended all confinement in excess of 54 months.

A court-martial is free to impose any legal sentence it deems appropriate. *United States v. Turner,* 34 C.M.R. 215, 217 (C.M.A. 1964); R.C.M. 1002. On review, a

court of criminal appeals "may affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ. Courts of criminal appeals are tasked with determining sentence appropriateness, rather than granting clemency. *United States v. Healy,* 26 M.J. 394, 395-396 (C.M.A. 1988); R.C.M. 1107(b). Clemency, which involves bestowing mercy, is the prerogative of the convening authority.

Sentence appropriateness involves the "'*individualized* consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(emphasis added)(quoting *United States v. Mamaluy,* 27 C.M.R. 176, 180-81 (C.M.A. 1959)). In raising the issue of sentence disparity, the appellant has the burden of "demonstrating that any cited cases are 'closely related' to his . . . case and that the sentences are 'highly disparate.'" *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *see also United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982). To be closely related, "the cases must involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994).

Although they were both caught up in the same investigation, the charges in the appellant's case and the charges in Pvt Cathey's case are significantly and

substantively different. Pvt Cathey was convicted only of wrongful use of controlled substances and was not convicted of the more serious offenses of conspiracy, manufacture, introduction, and distribution of controlled substances. Therefore, these cases are not closely related.

The charges in Pvt Ryan's and Pvt Tillinghast's cases are comparable to the charges in the appellant's case. They were convicted of conspiring with each other, and several other offenses that were factually interrelated. All were convicted of the serious offenses of conspiracy, manufacture, and distribution of controlled substances. We find these three cases to be "closely related" within the meaning of *Lacy* and *Kelly*.

We must next examine whether the appellant's sentence and that of his co-actors are "highly disparate", and whether there is a rational basis for any disparity. *See Lacy*, 50 M.J. at 288; *Kelly*, 40 M.J. at 570. We do not find the appellant's sentence to be highly disparate from that of either Pvt Ryan or Pvt Tillinghast. All three were adjudged a dishonorable discharge. Although Pvt Ryan's sentence to confinement was two years and eight months less than the appellant's confinement, he was not convicted of communicating a threat to kill Pvt Asher, the cooperating Government witness in the investigation. The sentences of the appellant and Pvt Tillinghast are identical except that Pvt Tillinghast was adjudged forfeiture of all pay and allowances. By operation of law, the appellant also loses all pay and allowances while confined. Art. 58b, UCMJ. Whether

Pvts Ryan and Tillinghast received the benefit of a pretrial agreement or clemency is irrelevant to this determination. We look at the sentences *adjudged* in closely related cases. *United States v. Sothen,* 54 M.J. 294 (C.A.A.F. 2001). We note that different officers took action on the appellant's and Pvt Ryan's cases, and that fact alone is a rational basis for the differences at the post-trial stage. We will not second-guess the convening authority's decision to treat these cases differently.

Based upon the entire record, including the case in extenuation and mitigation and the appellant's unsworn statement, we find that the appellant's sentence is not inappropriately severe for these very serious offenses. Art. 66(c), UCMJ. Given the appellant's previous court-martial conviction for drug as well as other offenses, given his voluntary and extensive involvement in drug conspiracies, drug manufacture, distribution and use, much of which occurred aboard a Marine Corps Base and involved other Marines, and mindful of the appellant's character and background, we are convinced that the sentence is appropriate in all respects for the offenses and this offender. *Healy*, 26 M.J. at 394; *Snelling*, 14 M.J. at 268.

Post-Trial Delay

In his third assignment of error, the appellant asserts that he has been denied speedy post-trial review of his court-martial in that 399 days passed before the record of trial was docketed with this court for appellate review. We disagree.

The salient dates and actions are set out below.

10 APR 02	Sentenced
10 JUL 02	Record of trial authenticated by Military Judge
23 AUG 02	Staff Judge Advocate's Recommendation (SJAR)
23 AUG 02	SJAR served on defense counsel
26 AUG 02	Defense request for 20 additional days in which to submit clemency matters
23 SEP 02	Defense clemency request submitted
26 SEP 02	Supplemental SJAR submitted
30 SEP 02	Convening Authority's Action / Court-Martial Order
14 MAY 03	Case docketed for appellate review

The appellant does not contend that the delay rises to the level of a due process violation, but rather asserts that reassessing the sentence is appropriate under this court's powers pursuant to Article 66, UCMJ. However, we will also consider whether a due process violation

occurred.

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004)(citing *Barker v. Wingo,* 407 U.S. 514, 530 (1972)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Jones,* 61 M.J. at 83. Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id. (*quoting *Toohey*, 60 M.J. at 102).

The only time period, which causes us any concern is the unexplained seven and one half month period between the convening authority's action and docketing with this court. We conclude that this period of delay is facially unreasonable. However, in the record, we find no assertion of the right to a timely appeal. The only claim of prejudice is that the appellant had by then already served two years of his confinement. He was sentenced to twelve years. We find no prejudice to the appellant caused by the delay. Thus, we conclude that there has been no due process violation due to the post-trial delay.

Appellate relief under Article 66(c), UCMJ, should be

viewed as a last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). While we do not condone the tardy transmission of the record to this court, we decline to grant relief on this ground. *Id. at* 224; *see also United States v. Bigelow*, 57 M.J. 64, 69 (C.A.A.F. 2002); *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001); *United States v. Jenkins*, 38 M.J. 287, 288 (C.M.A. 1993).

Conclusion

Accordingly, we affirm the findings and the sentence as approved by the convening authority.

Although not raised by the appellant, nor mentioned by the Government, both the staff judge advocate's recommendation and the general court-martial order contain errors as to the pleas and the findings. As to Specification 1 of Charge II, both incorrectly state that the appellant pled not guilty and that the specification was withdrawn. In fact, the appellant pled guilty and was found guilty of that specification. As to the sole specification of Charge III, both incorrectly state that the appellant pled guilty. Actually, the appellant pled not guilty.

The appellant does not contend, nor do we find, that he was prejudiced by these scrivener's errors. However, he is entitled to accurate records regarding his court-martial. *United States v. Crumpley*, 49 M.J. 538, 539

(N.M.Ct.Crim.App. 1998). We therefore direct that the supplemental court-martial order accurately reflect the pleas and findings as to Specification 1 of Charge II, and the sole specification of Charge III, as noted above.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix OO

UNITED STATES, Appellee

v.

Trent T. PRITCHETT
Quartermaster First Class (E-6), U.S. Navy

No. 05-741/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 9601212

September 11, 2006, Ordered

Counsel for Appellant: Joseph W. Kastl, Esq.

Counsel for Appellee: Craig A. Poulson, JAGC, USNR.

On consideration of the granted issue, in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006), we conclude that Appellant was denied his due process right to speedy post-trial review and appeal, and that error was not harmless beyond a reasonable doubt, but that "to fashion relief that would be actual and meaningful in this case would be disproportionate to the possible harm generated from the delay." *Id.* At 386.

Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in United States v. Moreno, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix PP

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

Charles Wm. DORMAN C.A. PRICE R.C. HARRIS

UNITED STATES

v.

Trent T. PRITCHETT
Quartermaster First Class (E-6), U.S. Navy

NMCCA 9601212 Decided 14 July 2005

Sentence adjudged 13 Aug 1999. Military Judge: A.W. Keller. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Submarine Group TEN, Kings Bay, GA.

LT STEPHEN C. REYES, JAGC, USNR, Appellate Defense Counsel
LT CRAIG A. POULSON, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Senior Judge:

This is a rehearing of charges first tried in 1994. In that first trial, the appellant was convicted of substantially the same charges as in this rehearing. Because the military judge committed an error that materially prejudiced a substantial right of the appellant by denying him a peremptory challenge of newly detailed members, we set aside the findings and sentence and authorized a rehearing. *United States v. Pritchett*, 48 M.J. 609 (N.M.Ct.Crim.App. 1998).

At the rehearing, contrary to his pleas, the appellant was convicted of forcible sodomy of a child under the age of 16 and indecent act with a child under the age of 16 (two specifications), in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. A military judge sitting as a general court-martial sentenced the appellant to confinement for four years, forfeiture of $500.00 pay per month for four years, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and credited the appellant with confinement served from 9 June 1994 until 21 July 1997.

The appellant asserts that: (1) he has been denied timely appellate review; (2) the evidence is legally and factually insufficient; (3) the military judge erred in failing to suppress the appellant's statements made to a family

advocacy representative, Ms. Pettaway, and to Dr. Leigh; and (4) the military judge erred in failing to suppress the appellant's statements to the Naval Criminal Investigative Service (NCIS) and Ms. Blackmore, and real evidence seized during a search of his home.[1]

We have carefully considered the record of trial, the appellant's assignments of error, and the Government's response. As modified, we conclude that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Appellate Delay

To assist in our analysis of the assignment of error of appellate delay, we provide the following chronology:

13 Aug 99	Sentence adjudged
20 Mar 00	Convening authority's action promulgated
14 Apr 00	Record docketed

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[1] With the exception of denial of timely appellate review, all the assignments of error are submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

20 Feb 03	*May* Order issued[1]
17 Mar 03	30th Motion for Enlargement of Time denied; case placed in panel for decision
21 Jun 04	Appellate Defense Motion to File Brief granted
14 Oct 04	Appellate Government brief filed
28 Oct 04	Case again placed in panel for decision

The record of trial totals 772 pages.

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id., slip op.* at 9.

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[1] *United States v. May*, 47 M.J. 478 (C.A.A.F. 1998).

The length of appellate delay is a threshold factor that determines whether additional analysis is necessary. If the delay is not excessive, further scrutiny may be avoided. If the delay is excessive, the other factors must be applied and evaluated.

We conclude that the delay in appellate review has been excessive. This case sat in the Appellate Defense Division for nearly three years before we issued an order in accordance with *United States v. May.*[1] Over the course of 29 motions for enlargement of time, several successive appellate defense counsel asserted a variety of reasons for the requested delay. Based on the representations of counsel, it appears that most of the delay was attributable to large caseloads. While we are sympathetic to the plight of appellate defense counsel assigned to represent a multitude of clients, each lawyer who enters an appearance has a duty to read the record and file a brief or submission on the merits in a timely manner. Based on the facts and circumstances of this case, three years is not timely, nor are the explanations for the delay acceptable. *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38-40 (C.A.A.F. 2003).

We note that, in the absence of any appellate defense brief, before this court could decide the case on its

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[1] In that order, we stated that if appellate defense counsel did not file a brief by 10 March 2003, the court would review the case under Article 66(c), UCMJ. In that event, counsel would be expected to invite the court to consider any *Grostefon* issues.

merits, a motion was filed seeking consideration of the brief now before us. To ensure that the appellant was afforded the assistance of appellate defense counsel, albeit untimely, we granted the motion and accepted the brief.

We now consider the third and fourth factors. We find no assertion of the right to a timely appeal. In fact, from our review of the motions for enlargement, it is quite clear that the appellant desired ample time for appellate defense counsel to prepare a brief.

Moreover, we do not find any claim or evidence of specific prejudice. However, we are painfully aware that the appellant was first arraigned on the substance of the current charges in October of 1993. For more than 11 years, the appellant has been deprived of a final resolution of those charges. We conclude that while the appellant has not demonstrated his right to relief for prejudicial delay under Article 59(a), UCMJ, he is entitled to relief under Article 66(c), UCMJ. *United States v. Oestmann*, 61 M.J. 103 (C.A.A.F. 2005); *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). We will grant relief in our decretal paragraph.

Sufficiency of the Evidence

In a summary assignment of error, the appellant contends that, as to each charge and specification, the evidence is legally and factually insufficient. We

disagree.

This court's standard of review for sufficiency of the evidence is set forth in Article 66(c), UCMJ:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Further, this standard and its application have been recognized and defined by the Court of Appeals for the Armed Forces:

> [U]nder Article 66(c) of the Uniform Code, 10 U.S.C. § 866(c), the Court of [Criminal Appeals] has the duty of determining not only the legal sufficiency of the evidence but also its factual sufficiency. The test for the former is whether, considering the evidence in the light most favorable to the prosecution, a

> reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the Court of [Criminal Appeals] are themselves convinced of the accused's guilt beyond a reasonable doubt.

United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987).

We conclude that a reasonable factfinder could properly have found, beyond a reasonable doubt, that the appellant committed each of the offenses of which he stands convicted. Moreover, after careful consideration, we are convinced beyond a reasonable doubt that the appellant committed each of those same offenses.

NCIS Statement

In a summary assignment of error, the appellant asserts that the military judge erred when he did not suppress his NCIS statement. We disagree.

Because the assignment of error is presented in a summary format without discussion, we will address the arguments of the trial defense counsel (TDC) on the

issue. First, the TDC argued that, in general, the statement made to NCIS was not voluntary. Next, he argued that the appellant was not advised of the nature of the allegations against him until after the interrogation commenced. He also contended that NCIS promised the appellant that if he cooperated by making a statement, that the Chief of Staff of the convening authority would help him out, apparently suggesting some leniency in disposing of any charges. Finally, he contended that the timing and length of the interrogation, coupled with his desire to have his children returned to his custody, combined to overcome his will, leading to a false and involuntary admission.

In our decision in *United States v. Ellis*, 54 M.J. 958 (N.M.Ct.Crim.App. 2001), we summarized the law applicable to the appellant's arguments:

> The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property without due process of law. . . ." Accordingly, a confession must be voluntary before it can be admitted into evidence. *Dickerson v. United States*, 530 U.S. 428, 433, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). Congress expressly incorporated these rights into the UCMJ, which states that "no person subject to this chapter may compel any person to

incriminate himself or to answer any question the answer to which may tend to incriminate him," Art. 31(a), UCMJ, and that "no statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." Art. 31(d), UCMJ. The President, in turn, implemented these constitutional and statutory mandates in MIL. R. EVID. 304(a), which states, in pertinent part, that "an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule," and MIL. R. EVID. 304(c)(3), which defines an involuntary statement as one "obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement."

In *United States v. Bubonics*, 40 M.J. 734, 739 (N.M.C.M.R. 1994), *aff'd* 45 M.J. 93 (1996), this court stated that "the principles for determining whether a

pretrial statement was the product of coercion, unlawful influence, or unlawful inducement are essentially the same whether the challenge is based on the Constitution, Article 31(d), or MIL. R. EVID. 304." A confession is voluntary if it is "the product of an essentially free and unconstrained choice of its maker." *United States v. Ford*, 51 M.J. 445, 451 (1999)(quoting *Bubonics*, 45 M.J. at 95). "If his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Ford*, 51 M.J. at 451 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602, 6 L. Ed. 2d 1037, 81 S. Ct. 1860 (1961)).

When an accused objects at trial to the admission of his confession, the Government must prove by a preponderance of the evidence that the confession was voluntary. *Bubonics*, 45 M.J. at 95; MIL. R. EVID. 304(e). This determination is made by examining "the totality of all the surrounding circumstances" of the confession, including "both the characteristics of the accused and the details of the interrogation." *Ford*, 51 M.J. at 451 (quoting *Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 36 L. Ed. 2d 854, 93 S. Ct.

2041 (1973)); *United States v. Martinez*, 38 M.J. 82, 86 (C.M.A. 1993); *United States v. Jones*, 34 M.J. 899, 906 (N.M.C.M.R. 1992). Factors to be considered include the following: the provision of rights warnings; the length of the interrogation; the characteristics of the individual, including age and education; and the nature of the police conduct, including the use of threats, physical abuse, and incommunicado detention. *United States v. Sojfer*, 47 M.J. 425, 429-30 (1998). However, the "'totality of the circumstances' does not connote a cold and sterile list of isolated facts; rather, it anticipates a holistic assessment of human interaction." *Martinez*, 38 M.J. at 87.

On appeal, the voluntariness of a confession is a question of law that we review *de novo*. *Arizona v. Fulminante*, 499 U.S. 279, 287, 113 L. Ed. 2d 302, 111 S. Ct. 1246, (1991); *Ford*, 51 M.J. at 451. Although the military judge made essential findings of fact in ruling on the appellant's suppression motion, we are not bound by his findings under our Article 66(c), UCMJ, review authority. *United States v. Cole,* 31 M.J. 270, 272, (C.M.A. 1990). However, we are generally inclined to give such findings deference, so long as they are adequately supported by the

evidence of record. *Jones*, 34 M.J. at 905; *United States v. Ruhling*, 28 M.J. 586, 592 (N.M.C.M.R. 1988). *Id.* at 963-64.

At trial, the motion to suppress was thoroughly litigated. The military judge made detailed findings of fact, which we find to be adequately supported by the evidence of record. We conclude that the appellant knowingly and voluntarily waived his rights and signed a voluntary admission of his misconduct. The assignment of error is without merit.

Conclusion

We have considered the remaining assignments of error and find them lacking in merit. The findings are affirmed. We affirm only so much of the sentence extending to confinement for 42 months, reduction to pay grade E-1, and a bad-conduct discharge.

Chief Judge DORMAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix QQ

UNITED STATES, Appellee

v.

Aaron T. RUGGS, Staff Storekeeper Third Class (E-4), U.S. Navy, Appellant

No. 05-421/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200301267

September 11, 2006, Ordered

Counsel for Appellant: Capt. Rolando R. Sanchez, USMC.

Counsel for Appellee: LT Mark H. Herrington, JAGC, USNR.

On consideration of the granted issue, in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in United States v. Moreno, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix RR

IN THE U.S. NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

C.L. CARVER, D.A. WAGNER, R.W. REDCLIFF.

UNITED STATES

v.

Aaron T. RUGGS, Staff Storekeeper Third Class
(E-4), U.S. Navy

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

NMCCA 200301267 Decided 25 February 2005

Sentence adjudged 24 January 2002.
Military Judge: K.E. Grunawalt.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Training Center, Great Lakes, IL.

CAPT ROLANDO SANCHEZ, USMC, Appellate Defense Counsel.

LT GUILLERMO J. ROSAS, JAGC, USNR, Appellate Government Counsel.

WAGNER, Judge:

The appellant entered pleas of not guilty to forcible sodomy with a child under 16 years of age and indecent assault on a child under 16 years of age in violation of Article 125 and 134, Uniform Code of Military Justice, 10 USC §§ 925 and 934. He entered a plea of guilty to a lesser-included-offense of sodomy with a child under 16 year of age in violation of Article 125, UCMJ. A military judge sitting as a general court-martial convicted the appellant, as charged, of forcible sodomy with a child under 16 years of age and indecent assault on a child under 16 years of age in violation of Articles 125 and 134, UCMJ. The military judge sentenced the appellant to a dishonorable discharge, confinement for 6 years, and reduction to pay grade E-1. There was no pretrial agreement. The convening authority approved the sentence as adjudged.

The appellant alleges that the evidence adduced at trial was factually and legally insufficient to prove the appellant guilty beyond a reasonable doubt of forcible sodomy and indecent assault; that the military judge abused his discretion when he refused to recuse himself after speaking with the victim's family during the trial; that he was denied speedy post-trial review of his court-martial; and that the sentence of a dishonorable discharge was inappropriately severe for the crimes committed.

After carefully considering the record of trial, the appellant's assignments of error, the Government's response, and the appellant's reply, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant, a 26-year-old Navy petty officer, resided with his wife and son in the same neighborhood with the victim, J, a 14-year-old dependent residing with her parents. J routinely babysat for the appellant and his wife.

On 6 September 2001, a school day, J remained at home alone because she was not yet enrolled in school. The appellant, who was aware that she was home alone, came to her house on his way home for lunch and asked J about babysitting for him. Although the appellant's providence and J's testimony disagree as to when she was to babysit, there is no disagreement that he asked her to come to his residence at that time.

The appellant admitted during providence that he kissed J, fondled and sucked on her breasts, and had anal intercourse with her at his residence. He stated during providence that these acts were all consensual.

J testified that she went to the appellant's house and found him home alone. According to her testimony, the appellant made advances toward her, which she

rebuffed. She testified that he tried to kiss her, pulled her down onto him on the couch, and fondled and sucked on her breasts. J testified that the appellant pushed her into a bedroom, forced her face-down on the bed, pulled her pants down, and forcibly placed his penis in her rectum.

J returned to her house, hid in a closet, and placed a hysterical telephone call to her mother at work, telling her what had occurred. The police and an ambulance were called and responded. J was crying and barely able to speak. J was transported to the hospital, treated, and released. J suffered a tear to her rectum, but had no other apparent physical injuries.

Sufficiency of Evidence

The appellant alleges that the evidence adduced at trial was both legally and factually insufficient to prove beyond a reasonable doubt that he committed forcible sodomy and indecent assault.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and

recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

In this case, the sworn testimony of the victim is supported by the testimony of a neighbor who saw the appellant run from J's house after the incident, the testimony of J's mother, the testimony of the emergency medical technicians, the testimony of the treating sexual assault nurse, the testimony of the treating pediatrician, and, in substantial measure, by the admissions of the appellant. The defense sought to discredit J by exposing inconsistencies in some of the details between how she described the assault to a youth center employee and how she described the assault in her testimony at trial. The defense also sought to discredit J's testimony through cross-examination regarding entries she made in her diary regarding boys, love, and sex. The appellant did not testify on the merits.

Considering all the evidence presented in the light most favorable to the Government, it is clear that a rational trier of fact could have found the appellant guilty of each and every element of the charged offenses. Additionally, having reviewed all the testimony and evidence, and recognizing that we have not seen or heard the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. The evidence of guilt is overwhelming.

Recusal of the Military Judge

The appellant avers that the military judge erred by failing to recuse himself on defense motion for speaking to J's parents during a recess in the trial. We disagree.

The military judge stated on the record that he was approached by J's parents during a recess in the sentencing portion of the court-martial. He stated that they asked him about the military justice system and the difference between military and civilian judges. He explained the military and civilian justice systems to J's parents. The military judge also stated on the record that there was no discussion of the case and that the brief conversation would have no impact on how he viewed the case or the testimony before him.

We review a military judge's decision on recusal for an abuse of discretion. *United States v. Wright,* 52 M.J. 136, 141 (C.A.A.F. 1999). A military judge should disqualify himself when a reasonable person might question his impartiality. RULE FOR COURTS-MARTIAL 902(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). The decision to recuse should be assessed objectively from the standpoint of a reasonable person with knowledge of all the facts. *Wright,* 52 M.J. at 141. Here, the military judge made a full disclosure on the record of the conversation. He stated that it was not related to the case before him and would have no bearing on him. The defense counsel had the opportunity to voir dire the judge and the record before us demonstrates that the

appellant was in no way prejudiced by the military judge's decision not to recuse himself. *United States v. Campos,* 42 M.J. 253, 262 (C.A.A.F. 1995).

While the better practice for trial judges is to avoid all discussions with potential witnesses or other interested parties during trial, we find no error under the circumstances of this case. We specifically find that a reasonable person with knowledge of all the facts and circumstances contained in the record of trial would not perceive any lack of impartiality on the part of the military judge.

Post-Trial Delay

The appellant contends that the delay from the date his court-martial concluded to the date that this case was docketed for review with this court was unreasonable and asks that we grant relief. We disagree and decline to grant relief.

As stated by our superior Court in *United States v. Tardif,* 57 M.J. 219, 224 (C.A.A.F. 2002), this Court "has authority under Article 66(c) to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a), if it deems relief appropriate under the circumstances." We are further "required to determine what findings and sentence 'should be approved,' based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay." *Id.*

The appellant was sentenced on 24 January 2002, and the resulting 341-page record of trial was authenticated eight months later, on 20 September 2002. The convening authority took action on 12 February 2003 after considering the staff judge advocate's recommendation (SJAR) dated 17 October 2002, the appellant's clemency petitions submitted on 21 and 25 November 2002, the SJAR Addendum dated 16 December 2002, trial defense counsel's R.C.M. 1105 letter dated 3 January 2003, and the SJAR addenda dated 24 and 27 January 2003. The Navy-Marine Corps Appellate Review Activity received the original record of trial 7 months later, on 24 June 2003. The Court of Military Appeals found that size of the record and the complexity of the review were factors in determining whether delay was reasonable. *United States v. Timmons,* 22 C.M.A. 226, 46 C.M.R. 226, 227 (C.M.A. 1973). The delay in this case of one year and five months from sentencing until receipt by this court cannot be held to be unreasonable given the length and complexity of the record of trial.

Even assuming the delay to be unreasonable, the appellant claims no specific prejudice resulting from the delay and presents nothing to show that he has been in any way harmed or negatively impacted by the length of post-trial review in this case. Based on all the facts and circumstances in the record before us, including the post-trial delay, we are convinced that the findings and sentence approved by the convening authority should be affirmed.

Severity of Sentence

The appellant contends that the dishonorable discharge awarded as part of the military judge's sentence is too severe under the circumstances of this case. He asks that we disapprove the dishonorable discharge or, in the alternative, remit it to a bad-conduct discharge. We disagree and decline to grant relief.

After reviewing the entire record, we find that the sentence, including a dishonorable discharge, is appropriate for this offender and his offenses. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). The appellant was found guilty of forcible sodomy of a child under the age of 16 years of age and indecent assault on a child under 16 years of age. Such serious criminal conduct is deserving of such a severe punishment.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed. Senior Judge CARVER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix SS

UNITED STATES, Appellee

v.

Columbia R. SHILOH
Dental Technician First Class (E-6), U.S. Navy

No. 06-0034/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200101238

September 11, 2006, Ordered

Counsel for Appellant: Captain Rolando R. Sanchez, USMC.

Counsel for Appellee: Major Wilbur Lee, USMC.

On consideration of granted issues I and II in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. In addition, on consideration of granted issue III in light of United States v. Lovett, 63 M.J. 211, 215 (C.A.A.F. 2006), Appellant has failed to demonstrate that he exhausted his remedies in the prisoner-grievance system

or filed a complaint under Article 138, Uniform Code of Military Justice, 10 U.S.C. 938 (2000). Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in United States v. Moreno, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

UNITED STATES, Appellee
v.
Columbia R. SHILOH
Dental Technician First Class (E-6), U.S. Navy

No. 06-0034/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200101238

October 11, 2006, Ordered

Counsel for Appellant: Captain Rolando R. Sanchez, USMC.

Counsel for Appellee: Major Wilbur Lee, USMC.

On consideration of Appellant's petition for reconsideration of this Court's decision, __ M.J. __ (C.A.A.F. September 11, 2006), it is, by the Court, this 11th day of October, 2006,

ORDERED:

That said petition for reconsideration be, and the same is, hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

Appendix TT

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER C.A. PRICE D.A. WAGNER

UNITED STATES

v.

Columbia R. SHILOH
Dental Technician First Class (E-6), U.S. Navy

NMCCA 200101238 Decided 22 August 2005

Sentence adjudged 21 October 1999. Military Judge: D.M. Hinkley. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Japan, Yokosuka, Japan.

Capt ROLANDO SANCHEZ, USMC, Appellate Defense Counsel
Capt WILBUR LEE, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of unpremeditated murder, larceny, assault consummated by battery, and kidnapping, in violation of Articles 118, 121, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 918, 921, 928, and 934. The appellant was sentenced to a dishonorable discharge, confinement for 25 years, total forfeiture of pay and allowances, and reduction to pay grade E-1. The pretrial agreement had no effect on the sentence. The convening authority approved the sentence as adjudged.

The appellant claims in his first assignment of error that the military judge erred by granting the Government's motion in limine to admit into evidence the appellant's confession to Japanese authorities because the appellant's defense counsel was not apprised of the pending interrogation, in contravention of his rights to counsel under the Fifth and Sixth Amendments to the Constitution. In his second assignment of error, the appellant claims that the military judge erred by denying his motion to dismiss for a violation of his Article 10, UCMJ, right to a speedy trial. In his third assignment of error, the appellant alleges that the post-trial delay in processing his record of trial and reviewing his court-martial was excessive and unreasonable. In his fourth and final assignment of error, the appellant

contends that he has suffered cruel and unusual punishment after trial due to the conditions of his confinement.

By our order dated 16 May 2005, this court specified the following issue to the parties:

> Whether the appellant received inadequate assistance of counsel during appellate review of his court-martial where the initial appellate defense counsel filed 28 motions for enlargement of time, including the 23rd, 24th, 25th, and 26th requests wherein the appellate defense counsel stated that the appellant assented to the requests for expedited review filed by appellate defense counsel before this court, and where the appellant states in affidavit dated 25 June 2004 that he "expressly and explicitly made several requests to appellate counsels (sic) to expedite [his] appellate review."

After carefully considering the record of trial, the appellant's assignments of error, the Government's response, the reply brief, the appellant's brief and specified assignment of error, and the Government's answer, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

On 13 March 1997, in an off-base apartment complex in Yokosuka, Japan, the appellant brutally assaulted and murdered his pregnant neighbor, a Japanese national. The victim's husband, a Sailor, was deployed at the time. The facts adduced at trial disclosed that, in the early morning hours, Mrs. Brock fled her apartment, chased by the appellant. He grabbed her forcibly by the arm and dragged her, kicking and screaming, back into her apartment, where he strangled her. He then took her pajamas, cell phone, and apartment key and disposed of them in a dumpster.

Japanese police officials initially opened an investigation, asking for assistance from the Naval Criminal Investigative Service (NCIS), but not entering into a joint investigation. As part of this assistance, NCIS conducted an interview of the appellant where he provided a typed confession. The appellant was then placed in military pretrial confinement and NCIS began their own investigation. Further requests for assistance from Japanese authorities were referred from NCIS to Commander, Fleet Activities, Yokosuka. Japanese officials later conducted their own interviews with the appellant and obtained oral and hand-written confessions.

At trial, the military judge suppressed the confession provided to NCIS. The Government requested a continuance in the case in order to file an appeal of the military judge's ruling suppressing the

confession. The trial was recessed on 5 March 1998 and reconvened on 11 June 1999, after the Government appeal proved unsuccessful. A Government motion in limine to admit into evidence the confessions provided to Japanese investigators was granted and the appellant subsequently entered unconditional guilty pleas.

Confession

In his first assignment of error, the appellant asks this court to review the military judge's ruling granting the Government's motion in limine seeking to admit into evidence the confessions provided to Japanese authorities. We decline to do so. The appellant's unconditional guilty pleas waived appellate review of this issue. RULE FOR COURTS-MARTIAL 910 (j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), *United States v. Corcoran*, 40 M.J. 478, 482 (C.M.A. 1994).

Trial defense counsel and the appellant both acknowledged at trial that the entry of guilty pleas waived the appellant's right to appeal the ruling of the military judge regarding the motion in limine. Trial defense counsel stated, however, his understanding that any appeal founded in denial of due process was not waived by the pleas. The appellant fails to establish a denial of due process for our consideration. The appellant attempts to have this court review an issue involving the admissibility of evidence in the face of a voluntary guilty plea and an informed waiver on the record by labeling the issue as a due process concern.

The argument is not persuasive and is not supported by any citation to authority.

Speedy Trial

In his second assignment of error, the appellant alleges that the military judge erred when he denied the appellant's motion to dismiss for a violation of his right to a speedy trial. The appellant asserts this allegation of error solely under Article 10, UCMJ. At trial, the appellant raised the speedy trial motion under Rule for Courts-Martial 707, Article 10, and the Sixth Amendment. The military judge denied the motion on all grounds.

Before accepting the appellant's pleas, the military judge informed the appellant that, "By a plea of guilty you also give up the right to appeal the decision I made on your motion to dismiss on speedy trial grounds..." Record at 812. The trial defense counsel agreed, stating, "Your Honor, in a technical sense, all motions that the defense has filed thus far, the guilty plea would waive further appeal." Record at 813. The trial defense counsel also asked the appellate courts, "in the interest of justice," to consider the waived speedy trial issue in spite of the expressed waiver if an appeal then pending before the Court of Appeals for the Armed Forces (C.A.A.F.) in a similar, but unidentified, case were to produce favorable precedent. Record at 815-16.

Our superior court has determined that the appellant's Article 10 speedy trial rights are not waived

by an unconditional guilty plea. *United States v. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005). We, therefore, are bound by precedent to consider the issue presented by the appellant in his allegation of error.

Article 10, UCMJ, requires the Government to act with reasonable diligence in proceeding to trial following imposition of pretrial arrest or confinement. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). The Government's duty to employ reasonable diligence continues beyond arraignment. *United States v. Cooper*, 58 M.J. 54, 59 (C.A.A.F. 2003). In determining whether the Government used reasonable diligence to take immediate steps to try the appellant, we apply a *de novo* standard of review. *Id.* at 58.

The Supreme Court has established four factors to consider in determining whether there has been a violation of speedy trial rights under the Sixth Amendment: the length of the delay, the reasons for the delay, whether a demand was made for speedy trial, and whether the appellant was prejudiced by the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The Court emphasized that the appellant's "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.*, at 532. In the context of analyzing a speedy trial issue under Article 10, UCMJ, we are required to apply these factors, but with the caveat that it is the Government who shoulders the burden of establishing that they acted with reasonable diligence in talking immediate steps to bring the appellant to trial. *United States v. Birge*, 52 M.J. 209,

212 (C.A.A.F. 1999).

Applying those factors to the appellant's court-martial, we note: (1) the appellant made no demand for speedy trial or for release from pretrial confinement; (2) the appellant did move to dismiss the charges based on a lack of speedy trial; (3) the appellant negotiated a pretrial agreement for a period of approximately one month before signing it on 11 August 1999, just 20 days before entering guilty pleas; (4) the appellant received credit for his pretrial confinement on his sentence; (5) there is no evidence of willful or malicious conduct on the part of the Government to create the delay; (6) the convening authority approved a delay of 45 days for translation of 700 pages of Japanese documents instead of the 60 days requested by the Government; (7) the defense requested several delays, including a request for a four-month delay of the Article 32, UCMJ, investigation that was approved for just over one month; (8) the appellant benefited from the time and effort of appellate counsel during the Government appeal of the military judge's ruling to suppress statements given to investigators by prevailing on the issue; and (9) appellant suffered no prejudice to the preparation of his case as a result of the delay.

On the basis of our *de novo* review of the record of trial, we conclude that the Government acted with reasonable diligence under the circumstances of this case in taking immediate steps to bring the appellant to trial following imposition of pretrial confinement. We, therefore, decline to grant relief.

Speedy Review

In his third assignment of error, the appellant contends that he was denied speedy review of his court-martial both because of the delay between sentencing and the date the record of trial was received for docketing before this court and because of the delay incurred by appellate defense counsel in reviewing and briefing the issues before this court.

We consider first the appellant's due process right to speedy review. Specifically, we look to four factors in determining if the delay has violated the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Jones*, 61 at 83. Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.*

Here, the 1277-page, 18-volume record of trial was prepared and authenticated 264 days after sentencing. The staff judge advocate completed review of the record and signed his recommendation 261 days after the record was authenticated. The convening authority took action

on the record 79 days later, and the record was received at this court 26 days after the convening authority's action. While the processing of this extensive record was slow in both authentication of the record of trial and in preparing the staff judge advocate's recommendation, it is not so egregious when considered in light of the size of the record as to label it unreasonable on its face.

Since there are no explanations for the delay in the record, we look to the third factor. We find no assertion of the right to a timely appeal. The appellant states that he expressed his concern over the delay to his assigned appellate defense counsel, but specifically states that he does not allege ineffective assistance of counsel on their part. In response to this court's specified issue of inadequacy of appellate counsel, the original appellate defense counsel provided an affidavit wherein he states that he spoke with the appellant and received the appellant's assent to the various requests for enlargement of time. The appellant does not refute this assertion. There is nothing before the court to indicate that appellate defense counsel ever requested expedited review of this case or asked for assistance from their superiors in order to expedite the review of this case. Appellate defense counsel continued to file enlargement requests stating that they had exercised due diligence and had placed priority in completing other cases over the appellant's case.

Turning to the fourth factor, we do not find any evidence of prejudice suffered by the appellant from the delay in this case. The appellant advances no

meritorious allegations of error in his briefs to this court. He is serving a 25-year sentence to confinement and has had ample contact with his appellate defense counsel, as is amplified in his affidavit to the court. Additionally, the delay in this case is not so egregious as to give rise to a presumption of prejudice. Thus, we conclude that there has been no due process violation due to the post-trial delay.

As to the appellant's third assignment of error concerning post-trial delay, we are cognizant of this court's power under Article 66(c), UCMJ, to grant sentence relief for excessive post-trial delay even in the absence of actual prejudice. *United States v. Oestmann*, 61 M.J. 103 (C.A.A.F. 2005); *United States v. Toohey*, 60 M.J. 100 (C.A.A.F. 2004); *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

The vast bulk of delay, 1083 days, occurred between receipt of the record of trial and filing of the appellant's brief before this court. While the amount of time it took the appellate defense counsel to read and brief this record was excessive, we have not found any prejudice or other harm to the appellant resulting from it, nor have we concluded that the delay affects the "findings and sentence [that] *'should be approved,'* based on all the facts and circumstances reflected in the record." *Id.* (emphasis added). Thus, we find no merit in this assignment of error and decline to grant the requested relief.

Cruel and Unusual Punishment

In his fourth and final assignment of error, the appellant contends that his conditions of post-trial confinement amount to cruel and unusual punishment prohibited by Art. 55, UCMJ, and the Eighth Amendment. The appellant fails to establish that he has addressed his concerns to proper authority in an effort to have them addressed. He must exhaust his administrative remedies before asking this court for relief. *United State v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001). This assignment of error lacks merit.

Adequacy of Appellate Counsel

The appellant bears a weighty burden to show ineffective assistance of counsel. *United States v. Moulton*, 47 M.J. 227, 229 (1997). This is because his defense counsel are "strongly presumed" to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Strickland* establishes a two-part test for the appellate courts to use in determining whether relief is required for ineffective assistance of counsel. First, the appellant must establish that the trial defense counsel's performance was somehow deficient, and then the appellant must show resulting prejudice. *Id.*

The appellant claims that his original appellate defense counsel was deficient because he failed to file any substantive pleadings in the appellant's case, but

makes no showing as to what pleadings should have been timely filed. As stated previously, the appellant's allegations of error before this court bear no merit and he was, in all respects, afforded a fair and complete trial.

The appellant also claims that his original appellate defense counsel suffered a conflict of interest between the appellant's case and the other cases competing for counsel's interest. The act of prioritizing cases does not create a conflict of interest and we explicitly reject this argument on its face. While the appellant did make requests to his counsel to expedite his case, he also decided to give his assent to requests for additional time to file his pleadings.

Other than the delay itself, the appellant presents no evidence that his original appellate defense counsel was deficient in any way. In fact, the number and quality of the communications between the appellant and his counsel indicate that his original defense counsel was active in monitoring his case and keeping the appellant apprised of the progress or lack thereof in completing his appeal.

In short, the appellant has failed to overcome the presumption that his original appellate defense counsel was effective. In addition, for the reasons set forth previously in this opinion, we find no prejudice resulting from the delay in this case, and, therefore, no prejudice resulting from appellate defense counsel's performance.

Conclusion

Accordingly, the findings of guilty and sentence, as approved by the convening authority, are affirmed.

Senior Judge CARVER and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix UU

UNITED STATES, Appellee

v.

Lori L. SPENCER
Gunner's Mate (Missiles) Seaman Apprentice (E-2), U.S. Navy, Appellant

No. 06-0052/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200401948

September 11, 2006, Ordered

Counsel for Appellant: LT Richard H. McWilliams, JAGC, USNR.

Counsel for Appellee: Maj Kevin C. Harris, USMC.

On consideration of the granted issue, in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in *United States v. Moreno*, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result)

Appendix VV

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER D.A. WAGNER E.B. STONE

UNITED STATES

v.

Lori L. SPENCER
Gunner's Mate (Missiles) Seaman Apprentice (E-2), U.S. Navy

NMCCA 200401948 Decided 26 August 2005

Sentence adjudged 3 May 2002. Military Judge: D.P. Price.
Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Atlantic Ordnance Command, Yorktown, VA.

CAPT PATRICIA LEONARD, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel

Maj KEVIN HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:
We have examined the record of trial, the assignment of error regarding post-trial processing delay, and the Government's response. We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.*

With regard to the first *Jones* factor, length of the delay, we find the delay of 1006 days between sentencing and docketing at this court to be facially unreasonable. Regarding the second *Jones* factor, reasons for the delay, we find, in consonance with the Government's admission, that the delay is unexplained and triggers a due process analysis. With regard to the third *Jones*

factor, the appellant's assertion of the right to a timely appeal, we find no assertion of the right to a timely appeal until the filing of the appellant's brief at this court almost 1100 days after the date of trial. Regarding the fourth prong, prejudice, we first find no "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice. Presuming no prejudice, we next search for actual prejudice. The record does not reveal, nor do we find, any claim or evidence of actual prejudice. Thus, we conclude that there has been no due process violation due to the post-trial delay in this case.

We are also aware of our authority to grant relief under Article 66, Uniform Code of Military Justice, 10 U.S.C. §§ 866, but we decline to do so. *Id.*; *United States v. Oestmann*, 61 M.J. 103 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 102; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif,* 57 M.J. 219, 224 (C.A.A.F. 2002).

We therefore conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *See* Arts. 59(a) and 66(c), UCMJ.

Accordingly, the findings of guilty and the sentence, as approved below, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

Appendix WW

UNITED STATES, Appellee

v.

Wayne D. SZYMCZYK
Major (O-4), U.S. Marine Corps

No. 05-0697/MC

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 20000718

October 20, 2006, Ordered

Counsel for Appellant: LT Brian L. Mizer, JAGC, USN.

Counsel for Appellee: LT Mark H. Herrington, JAGC, USNR.

On consideration of Appellant's motion for leave to file petition for reconsideration and the petition for reconsideration of this Court's decision, _ M.J._ (C.A.A.F. September 11, 2006), and in light of United States v. Rodriguez-Rivera, 63 M.J. 372 (C.A.A.F. 2006), it is, by the Court, this 20th day of October, 2006,

ORDERED:

That said motion is hereby granted; and

That said petition for reconsideration is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

Appendix XX

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER R.W. REDCLIFF J.D. HARTY

UNITED STATES

v.

Wayne D. SZYMCZYK
Major (O-4), U.S. Marine Corps

NMCCA 200000718 Decided 23 June 2005

Sentence adjudged 26 February 1999. Military Judge: S.F. Day. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), FMF, Camp Pendleton, CA.

WILLIAM E. CASSARA, Appellate Civilian Counsel
Maj ANTHONY C. WILLIAMS, USMC, Appellate Defense Counsel
PHILIP D. CAVE, Appellate Civilian Counsel
LT BRIAN MIZER, JAGC, USNR, Appellate Defense

Counsel
LT LARS JOHNSON, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Judge:

A general court-martial, composed of officer members, convicted the appellant, contrary to his pleas, of 3 specifications of conduct unbecoming an officer, transporting child pornography in interstate or foreign commerce, receiving child pornography through interstate or foreign commerce, possessing 3 or more items containing child pornography that were transported in interstate or foreign commerce, and sending and exchanging obscene matters in interstate commerce or through an interactive computer service, in violation of Articles 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 933 and 934, and 18 U.S.C. § 2252(a)(1),(2) and (4), and 18 U.S.C. § 1465. The members sentenced the appellant to a dismissal and confinement for 3 months. The convening authority (CA) disapproved and dismissed the finding of guilt to Specification 3, Charge II.[1] Otherwise, the CA approved

[1] Knowingly and wrongfully possessing 3 or more matters containing visual depictions of minors engaging in sexually explicit conduct transported in interstate or foreign commerce in violation of 18 U.S.C. § 2252(a)(4).

the findings and sentence as adjudged and, except for the dismissal, ordered the sentence executed.

This court has carefully examined the record of trial, the appellant's 6 assignments of error,[1] and the Government's Answer. We find that the findings, as corrected herein, and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant subscribed to Infinity Internet Incorporated (Infinity), an internet service provider (ISP) located in Temecula, Riverside County, California. The appellant used this ISP to enter chat rooms from his home computer using the screen name "Aurther." One of the chat rooms entered was "dad&daughtersex." In this chat room, the appellant met and communicated with "SuzyQ17" who turned out to be an undercover detective with the Miami-Dade County Police Department, Miami, Florida. The appellant engaged in sexually explicit conversation with, and sent

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[1] The appellant's fifth assignment of error alleges there is legally insufficient evidence to support Specification 3, Charge II. That issue is moot as the CA dismissed that specification in his action. We are puzzled as to why counsel for both sides would brief an issue involving a dismissed specification.

photographs of minors engaged in sexually explicit conduct to, "SuzyQ17."

The Miami detective used a chat program that recorded the date, time, images sent by and both sides of the conversation with "Aurther." He further conducted a query that traced the appellant's screen name to Infinity and provided its address in Temecula, California. The Miami detective turned the information over to a U.S. Customs agent who provided the information to a detective with the Riverside County Sheriff's Department, Riverside, California.

The Riverside detective was informed that some ISPs do not provide account identification information without a warrant. With that knowledge, the detective went to Infinity in hopes they would voluntarily provide the account owner's name. The detective was, however, prepared to obtain a warrant if necessary. The detective identified himself as a law enforcement official to the Infinity employee, stated that he was working on an internet child pornography investigation, and explained that he was looking for information that would identify "Aurther." The employee explained that the person who could provide that information, the technical contact, was not there but would return later that day.

The detective returned to Infinity to meet with the ISP's technical contact person later that day. That person had the requested information waiting for the detective. Infinity never requested a warrant or other court order before providing the requested information. The

provided information identified "Aurther" by name and address. With the information from Miami-Dade County and the information received from the appellant's ISP, the detective sought and obtained a search warrant for the appellant's residence. The warrant was executed at the appellant's home resulting in the seizure of nearly 800 visual depictions of minors engaged in explicit sexual activity plus visual depictions of other obscene matters depicting bestiality and rape. Record at 392-93.

Lawfulness of Search

For his first assignment of error, the appellant alleges the military judge erred by denying the appellant's motion to suppress the results of an unlawful search of the appellant's home. The appellant asserts the search was illegal because the warrant was obtained with information seized from his ISP in violation of his 4th Amendment, right against warrantless searches, as well as in violation of the Electronic Communications Privacy Act (ECPA), 18 U.S.C. §§ 2701-2712. Appellant's Brief of 21 Jan 2003 at 2-12. The Government counters that the appellant did not have a reasonable expectation of privacy in the information and, therefore, a warrant was not required to obtain information from the ISP. The Government further argues that even if the information was obtained in violation of the ECPA, that statute does not provide an exclusion remedy. Finally, the Government asserts that the information would have inevitably been discovered anyway. Government's Answer of 28 Aug 2003 at 3-8.

"A military judge's denial of a motion to suppress is reviewed for an abuse of discretion." *United States v. Khamsouk,* 57 M.J. 282, 286 (C.A.A.F. 2002)(citing *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000)). When considering the correctness of a military judge's ruling on a motion to suppress, we review the military judge's findings of fact under a clearly erroneous standard, and review his conclusions of law *de novo. Id.*

The threshold question is whether the appellant had a reasonable expectation of privacy in his ISP subscriber account information. An expectation of privacy exists when "an actual or subjective expectation of privacy is exhibited by a person in a place and when that expectation is one that society recognizes as reasonable." *United States v. Britton,* 33 M.J. 238, 239 (C.M.A. 1991)(citing *Smith v. Maryland,* 442 U.S. 735, 740-41 (1979)). "A person may challenge the validity of a search only by asserting a subjective expectation of privacy which is objectively reasonable." *Monroe*, 52 M.J. at 330 (citing *Minnesota v. Olson*, 495 U.S. 91, 95 (1990)).

This court recently addressed a very similar issue in *United States v. Ohnesorge*, 60 M.J. 946 (N.M.Ct.Crim.App. 2005). There, the appellant had downloaded pornography onto a government computer through a subscription to EasyNews.com operated by El Dorado Sales, Inc. (El Dorado). The appellant accessed the subscription through his America on Line (AOL) account with a user name of "RuhRowRagy." An agent of the U.S. Customs Service went to El Dorado and

asked if they had a subscriber with that user name, and assured El Dorado that an administrative summons or subpoena would be provided for the information. The Customs agent did not have a summons, subpoena or search warrant at the time. El Dorado then searched the subscriber database and found the pertinent account information. The appellant's name, service activation date, and the credit card number used to pay for the subscription was turned over to the agent. Customs served an administrative warrant on El Dorado 2 weeks later.

The appellant in *Ohnesorge* asserted, as does the appellant herein, that the Government's request for subscriber information constituted a search under the Fourth Amendment, that he had a reasonable expectation of privacy in that subscriber information, and that absent a warrant or similar authority, the obtaining of that information violated his Fourth Amendment rights and his rights under the ECPA. The Government contended, as it does here, that the appellant did not have a reasonable expectation of privacy in the subscriber information.

This court found there was no reasonable expectation of privacy in the subscriber information because: one, "there is a difference in the content of private communications and the means by which those communications are authorized, i.e., subscriber information"; two, "the nature of the agreement that the appellant had with EasyNews.com" put the appellant on notice the information may be shared with third parties;

and, three, "the congressional intent manifest in the provisions of the ECPA" shows subscriber information may be shared with third parties. *Ohnesorge*, 60 M.J. at 949.

Here, there is no evidence concerning the contract between the appellant and Infinity establishing how personal information would be handled. However, our superior court has suggested that there is no reasonable expectation of privacy in subscriber information. *See United States v. Maxwell*, 45 M.J. 406, 418 (C.A.A.F. 1996)(The subscriber to an ISP has a reasonable expectation of privacy in the content of electronic mail but not to the ISP's account records).

For the reasons stated above, and based on our review of the record, we conclude that the military judge did not abuse his discretion in denying the appellant's motion to suppress evidence. Even if the appellant held a subjective expectation of privacy in his subscriber information, such an expectation would be objectively unreasonable. And even if the appellant's expectation of privacy was objectively reasonable, we hold that the information would have inevitably been discovered through a search authorization or warrant for that information. *See Nix v. Williams*, 467 U.S. 431 (1984); *Maxwell*, 45 M.J. at 422-23.

Multiplicity

For his third assignment of error, the appellant alleges that the specifications under Charge II, alleging

violations of Article 134, UCMJ, are multiplicious with Specification 2 under Charge I, alleging a violation of Article 133, UCMJ, based on the same conduct. Appellant's Brief at 19-22. The Government concedes this issue. Government's Answer at 10-12.

Multiplicity is a concept derived from the constitutional concept of double jeopardy[1] prohibiting individuals from being twice punished for a single offense. *Albernaz v. United States*, 450 U.S. 333, 344 (1981). The legislature, however, is free to define crimes so that a single act may constitute several offenses. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). The question for the court is whether Congress intended the offenses to be separate for punishment purposes. *See United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993). "[B]ut once the legislature has acted courts may not impose more than one punishment for the same offense. . . ." *Brown*, 432 U.S. at 165. Conviction for both a greater offense and a lesser included offense violates the Double Jeopardy Clause. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

Whether an offense is a lesser included offense is a matter of law that we review *de novo*. *United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002). We apply the "elements" test to determine whether an offense is factually the same as another offense and, therefore, lesser included in that offense. *United States v. Foster*, 40 M.J. 140, 142 (C.M.A. 1994). An offense is not

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[1] U.S. CONST. amend. V.

factually the same as another where one requires proof of some fact or facts that the other does not. *Blockburger v. United States,* 284 U.S. 299, 304 (1932). Such a determination can be made by comparing elements and determining whether each element of the lesser offense is "rationally derivative of one or more elements of the other offense - and vice versa." *Foster,* 40 M.J. at 146.

We hold that Specifications 1 and 2 under Charge II alleging the "transporting" and "receiving" of child pornography, respectively, in violation of 18 U.S.C. § 2252 under clause 3 of Article 134, UCMJ, are the same acts alleged in Specification 2 under Charge I. The same photographs were admitted to prove each of these offenses. Prosecution Exhibits 2, 6, 17, 20, 21, and 22.[1] Specification 2 under Charge I, however, has at least 1 additional element unique to a charge of conduct unbecoming. Finding the appellant guilty of both the greater offense under Article 133, UCMJ, and the lesser included offenses under Article 134, UCMJ, was plain error. *Ball v. United States*, 470 U.S. 856, 864-65 (1985).

Although the appellant does not challenge Additional Charges I and II on multiplicity grounds, we find plain error there as well. Additional Charge I alleges an Article 133, UCMJ, violation for the "sending . . . [and].

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[1] Expert Tanner staging evidence was offered only as to Prosecution Exhibit 17 to establish the ages of the children depicted in the photographs. Record at 466-81.

. . exchanging with other persons . . . visual depictions involving obscene matters", and Additional Charge II alleges an Article 134, UCMJ, violation of 18 U.S.C. § 1465 by "transporting . . . visual depictions involving obscene matter." Charge Sheet. The military judge instructed the members that "transporting" for purposes of Additional Charge II meant "with the intent to ultimately transfer possession of the articles to another person or persons." Record at 606; AE XLII at 7. The photographs admitted as "obscene matter" were the same photographs for both additional charges. Prosecution Exhibits 2, 6, 17, 19, 20, 21, and 22.[1] For the reasons stated above, we hold that finding the appellant guilty of both the greater offense under Article 133, UCMJ, and the lesser included offenses under Article 134, UCMJ, was plain error.

In this case there is no need to consolidate the charges because Specification 2 under Charge I and the sole specification under Additional Charge I recite explicitly the significant facts. Accordingly, we will dismiss Charge II and its 2 specifications, and will dismiss Additional Charge II and its sole specification. We will reassess the appellant's sentence in our decretal paragraph.[2]

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[1] Prosecution Exhibit 19 appears to be the only exhibit containing photographs admitted solely on the allegations involving "obscene material."

[2] Because we are dismissing the charge and

Unreasonable Multiplication of Charges

For his fourth assignment of error, the appellant asserts that Additional Charge I alleging an Article 133, UCMJ, violation for the sending and exchanging of visual depictions involving obscene matters, and Additional Charge II alleging an Article 134, UCMJ, violation of 18 U.S.C. § 1465 by transporting visual depictions involving the same obscene matter, constitute an unreasonable multiplication of charges with Charge I and Charge II. Appellant's Brief at 23-27. The Government concedes that Additional Charge II is an unreasonable multiplication of charges with Charge II but does not address the balance of the assigned error. Government's Answer at 12-13. This assignment of error would appear to be mooted by our corrective action taken to resolve the multiplicity error, however, further discussion is required.

We use the following nonexclusive factors to determine whether there was an unreasonable multiplication of charges:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?

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specifications alleging violations of 18 U.S.C. § 2252, transporting and receiving child pornography, the appellant's second assignment of error challenging those convictions under *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), is moot.

(2) Is each charge and specification aimed at distinctly separate criminal acts?

(3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
(4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?

(5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

In weighing all of these factors together, we are able to determine whether charges are unreasonably multiplied. *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(*en banc*), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition). We note at the outset that the appellant did not object to the charges or specifications as being an unreasonable multiplication of charges. Under the facts and circumstances of this case, we will not apply the principle of forfeiture, despite the absence of an appropriate motion at trial.

Conduct unbecoming an officer is described, in part, as an:

[A]ction or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's

standing as an officer . . . . This article includes acts made punishable by any other article . . .

MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 59c(2).

The appellant's actions can be broken down into two distinct acts. First, he engaged in a sexually explicit chat room conversation during which he transferred 6 visual depictions involving the use of minors engaged in sexually explicit conduct. Two, he possessed and traded visual depictions of obscene material. Prosecution Exhibit 12 at 3. Those obscene visual depictions can be broken down into 2 categories: those involving the use of minors engaged in sexually explicit conduct, and those that are obscene but do not involve the use of minors engaged in sexually explicit conduct.[1] Although they may violate 2 different federal statutes, and be repugnant to 2 different societal interests, the photographs were possessed at the same location, at the same time, for the same purpose, and all were obscene.

Applying *Quiroz*, we find on balance that charging the appellant with 7 offenses constituted an unreasonable multiplication of the charges. We also find that the unreasonable "piling on" of charges resulted in prejudice to the accused. "[A]n unauthorized conviction has 'potential adverse collateral consequences that may not

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[1] Prosecution Exhibit 19 contained photographs of adults having sex with animals and adult females being raped.

be ignored,' and constitutes unauthorized punishment in and of itself." *United States v. Savage*, 50 M.J. 244, 245 (C.A.A.F. 1999)(quoting *Ball*, 470 U.S. at 865).

We have already provided some relief through our findings of multiplicity. The remaining charges include Specifications 1 (communicating obscene language in a chat room) and 2 (possessing and trading child pornography) under Charge I, and the sole specification (sending and exchanging obscene matter) under Additional Charge I, all alleging conduct unbecoming an officer under Article 133, UCMJ. We hold that creating 2 acts of conduct unbecoming out of the possession and trading of obscene photographs, based solely on the nature of the photographs' content, is an unreasonable multiplication of charges. We set aside the findings of guilty for Additional Charge I and its sole specification. Additional Charge I and its specification are dismissed.

Conclusion

We conclude that the remaining assignments of error are without merit. In summary, we have dismissed Charge II and its 2 specifications and Additional Charges I and II and their specifications. The findings as to Specifications 1 and 2 under Charge I and Charge I are affirmed.[1] Given our corrective action, we have

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[1] We have considered the appellant's sixth assignment of error, unlawful command influence based on the Commandant of the Marine Corps being in the building where the members were deliberating, and find the issue

reassessed the sentence in accordance with the principles set forth in *United States v. Cook*, 48 M.J. 434, 438 (1998) and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). We find that the sentence continues to be appropriate for the offenses and the offender and affirm the sentence as approved by the convening authority. The supplemental court-martial promulgating order shall reflect our action.

The appellant's Motion to Request Oral Argument of 14 October 2003 is hereby denied. The Government's Motion to Seal Prosecution Exhibits of 28 August 2003 is hereby granted. Investigative Exhibits 16, 22, and 23 and Prosecution Exhibits 2, 6, 17, 19-22, and Defense Exhibit A shall be sealed in the original and all copies of the record of trial.

Senior Judge CARVER and Judge REDCLIFF concur.

For the court

R.H. TROIDL
Clerk of the Court

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was fully discussed at time of trial and that there is no merit to the issue.

Appendix YY

UNITED STATES, Appellee

v.

Jeremy D. THOMPSON

Lance Corporal (E-3), U.S. Marine Corps

No. 04-0372/MC

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200101956

September 11, 2006, Ordered

Counsel for Appellant: LT Richard McWilliams, JAGC, USNR.

Counsel for Appellee: MAJ Brian Keller, USMC.

On consideration of the granted issue, in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006), assuming that the Appellant was denied the due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in *United States v. Moreno*, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix ZZ

IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

WASHINGTON NAVY YARD

WASHINGTON, D.C.

BEFORE

W.L. RITTER C.L. SCOVEL M.J. SUSZAN

UNITED STATES

v.

Jeremy D. THOMPSON

Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200101956 Decided 27 September 2005

Sentence adjudged 5 January 2001. Military Judge: L.K. Burnett. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Barracks, 8th & I Streets, Washington, DC.

LT JENNIE GOLDSMITH, JAGC, USNR, Appellate Defense Counsel

DAVID P. SHELDON, Civilian Defense Counsel

LT CHRISTOPHER HAJEC, JAGC, USNR, Appellate Government Counsel

Maj RAYMOND E. BEAL II, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A special court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of using disrespectful language toward a superior noncommissioned officer, wrongful distribution of ecstasy on divers occasions, and disorderly conduct, in violation of Articles 91, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 912a, and 934. The members sentenced the appellant to confinement for 30 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

We previously affirmed the findings and sentence in an unpublished opinion. United States v. Thompson, No. 200101956, unpublished op. (N.M.Ct.Crim.App. 20 Jan 2004). Our superior court set aside our decision because our previous opinion included verbatim replication of substantial portions of the Government's Answer without attribution. The case was remanded to our court

for a new review pursuant to Article 66(c), UCMJ, "before a panel of judges who have not previously participated in this case." United States v. Thompson, 60 M.J. 348, (C.A.A.F. 2004)(summary disposition).

The appellant declined to submit additional assignments of error or responses following remand. The original assignments of error asserted that the appellant's court-martial lacked jurisdiction to try him, the evidence was factually and legally insufficient to sustain his convictions for distributing ecstasy and disorderly conduct, the CA was erroneously informed that the appellant had been convicted of using ecstasy and failed to consider his clemency petition, and the sentence was inappropriately severe.

We have carefully examined the record of trial, the appellant's assignments of error, and the Government's response. We find that the court-martial order (CMO) incorrectly reports the court-martial's findings, and we order corrective action in our decretal paragraph. After taking this corrective action, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Jurisdiction of the Court-Martial

The appellant first contends that his court-martial was without jurisdiction to try him because the panel was selected through the improper exclusion of qualified

personnel. We disagree.

The appellant challenges the methodology utilized to select members of his court-martial. Specifically, he argues that Marine Corps Base Order 5420.1A required commanders of units at Marine Corps Base, Quantico, to nominate service members for duty as members of courts-martial based on grade and gender guidelines, thereby improperly including potential members in the group submitted for consideration by the CA, and excluding others, in violation of Article 25, UCMJ, and Rule for Courts-Martial 502(a), Manual for Courts-Martial, United States (2000 ed.). The order required that unit commanders nominate only enlisted service members in pay grade E-5 and above, and directed the nomination of a number of field grade officers (pay grade O-4 and above) that equaled almost 60% of the total number of officers nominated. Appellant's Motion to Attach of 21 Jan 2003 at encl. 1 (MCBO 5420.1A, encl. 2 at 1). Certain commands were directed to nominate female officer members. Id., at encl. 1 (MCBO 5420.1A, encl. 1 at 1).

While the military accused does not have a Sixth Amendment right to a jury selected from among his peers, as in civilian society, United States v. Lewis, 46 M.J. 338, 341 (C.A.A.F. 1997), he or she does have a right to qualified members who are fair and impartial. United States v. Roland, 50 M.J. 66, 68 (C.A.A.F. 1999). Congress gave the CA responsibility for selecting members to serve on courts-martial. See Art. 25(d)(2), UCMJ. The CA may not "skew" the process

to select members solely on the basis of rank. United States v. Nixon, 33 M.J. 433, 434-35 (C.M.A. 1991)(noting that the "sole exception" is that members should be senior to the accused (citing Art. 25(d)(1), UCMJ)). Nor may a court-martial be "'packed' to achieve a desired result." United States v. White, 48 M.J. 251, 254 (C.A.A.F. 1998)(quoting United States v. Hilow, 32 M.J. 439, 440 (C.M.A. 1991)). "Court packing may occur if a subordinate packs the list of nominees presented to the convening authority." White, 48 M.J. at 254. Military appellate courts must be "especially concerned to avoid either the appearance or reality of improper selection." United States v. McClain, 22 M.J. 124, 132 (C.M.A. 1986).

"Whether a court-martial panel was selected free from systematic exclusion is a question of law which we review de novo." United States v. Kirkland, 53 M.J. 22, 24 (C.A.A.F. 2000). The defense bears the burden of "establishing the improper exclusion of qualified personnel from the selection process." Id. (citing Roland, 50 M.J. at 69). If the defense is able to establish such exclusion, it is then incumbent upon the Government to show by competent evidence that "no impropriety occurred when selecting appellant's court-martial members." Id.

R.C.M. 912(b)(3) provides that the failure to make a timely motion challenging the selection of members shall waive the improper selection, unless such selection violates R.C.M. 501(a), 502(a)(1), or 503(a)(2). In this case, the appellant failed to raise this issue at trial but

now asserts improper selection under R.C.M. 502(a). However, he neither alleges nor establishes that the CA failed to apply the criteria of Article 25, UCMJ, and R.C.M. 502(a)(1). We will therefore apply waiver to the appellant's claim of error in the member selection process.

Even if waiver did not apply to this issue, the appellant still has the burden to establish the improper exclusion of qualified personnel from the selection process. While the appellant attached documents intended to reflect the member selection process in this case, we note that the members first selected by the convening authority's predecessor in command were apparently chosen using the base order's procedure from a group nominated in the July-December 1999 period and selected for court-martial membership for the January-June 2000 period. Appellant's Motion to Attach of 21 Jan 2003 at encls. 1 and 2. However, a successor in command signed a court-martial convening order on 3 August 2000, and modified it on 16 November 2000 and 20 November 2000 specifically for appellant's trial. Id. at encl. 2. We see no indication that the members before whom the case was actually tried were selected by the process to which the appellant objects. We find that the appellant has failed in his burden, and without evidence linking the selection of these members to this allegedly improper nomination process, we cannot conclude that qualified service members were improperly excluded from the selection process. Kirkland, 53 M.J. at 24.

Finally, the base order does not give the staff judge

advocate (SJA) an impermissibly direct and substantive role in the selection of members. Rather, it directs only that the SJA prepare biographical questionnaires of all court-martial nominees for submission to the convening authority and, after selection of members, prepare the court-martial convening order. Appellant's Motion to Attach of 21 Jan 2003 at encl. 1 (MCBO 5420.1A at 2). These actions are administrative in nature, and do not intrude on the CA's responsibility to select qualified members for courts-martial. This basis for the appellant's claim of error is without merit.

Sufficiency of Evidence

In his next two assignments of error, the appellant contends that the evidence supporting his convictions for distributing ecstasy on divers occasions and for disorderly conduct are both factually and legally insufficient. In both instances, the appellant requests that this court set aside the findings of guilty, dismiss the charges underlying those findings, and order a rehearing on sentence. As to both of these challenged offenses, we disagree and decline to grant the requested relief.

A military court of criminal appeals has an independent statutory obligation to review each case de novo for legal and factual sufficiency, and may substitute its own judgment for that of the trial court. Art. 66(c), UCMJ; United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987). In doing so, this court's assessment of both legal and factual sufficiency is limited only to the evidence presented at trial. United States v. Dykes, 38 M.J. 270,

272 (C.M.A. 1993).

The test for legal sufficiency is whether, considering the evidence admitted at trial in the light most favorable to the prosecution, a reasonable factfinder could have found that all the essential elements were proven beyond a reasonable doubt. United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000)(citing Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Spann, 48 M.J. 586, 588 (N.M.Ct.Crim.App. 1998), aff'd, 51 M.J. 89 (C.A.A.F. 1999). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. Reed, 54 M.J. at 41; Turner, 25 M.J. at 325; see Art. 66(c), UCMJ. Reasonable doubt does not mean that the evidence contained in the record must be free from any and all conflict. United States v. Reed, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), aff'd, 54 M.J. 37 (C.A.A.F. 2000).

In exercising the duty imposed by this "awesome, plenary, de novo power," United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990), this court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge or court-martial members. Art. 66(c), UCMJ. Further, we may believe one part of a particular witness's testimony yet disbelieve another part. United States v. Harris, 8 M.J. 52, 59 (C.M.A. 1979); see Art. 66(c), UCMJ.

1. Distribution of Ecstasy

The appellant was convicted of Specification 2 of the Additional Charge alleging that he distributed ecstasy on divers occasions. The Government's evidence consisted primarily of the testimony of two privates who had served in the same unit and lived in the same barracks as the appellant. These witnesses, Privates (Pvt) Vick and Hartman, provided testimony that implicated the appellant in the sale of ecstasy at various times. Pvt Vick, for example, testified that he directly received ecstasy pills from the appellant in his barracks room and paid the appellant for those pills. Pvt Hartman provided similar testimony, stating that he too had purchased ecstasy pills from the appellant. The trial defense counsel aggressively cross-examined these witnesses and attempted to undermine their credibility by demonstrating that each had received favorable pretrial agreements at their own courts-martial in exchange for their testimony against the appellant. The trial defense counsel was also able to identify inconsistencies between their testimony in the appellant's case and their prior statements to both criminal investigators and under oath at the appellant's Article 32, UCMJ, hearing.

Considering this evidence in the light most favorable to the prosecution, we conclude that a reasonable factfinder could have found, as did the members in this case, that all the essential elements of the offense of distributing ecstasy on divers occasions were proven beyond a reasonable doubt. We find the evidence of record on

this specification to be legally sufficient. We have also weighed the evidence and are ourselves convinced beyond a reasonable doubt of the appellant's guilt, and so find the evidence factually sufficient.

2. Disorderly Conduct

The appellant also challenges his conviction under Charge II and its specification, contending that the evidence is factually and legally insufficient to support a finding that he engaged in disorderly conduct. We disagree.

The appellant's alleged disorderly conduct occurred at the U.S. Naval Academy Cemetery. The appellant was assigned to a ceremonial funeral detail, which was under the charge of Sergeant (Sgt) Gobin. According to the testimony of Sgt Gobin, the funeral commenced later than the scheduled time and the detail, including the appellant, stood by, in uniform, waiting for the ceremony to begin. As the Marines waited, two civilian women walked past them. At that moment and within their hearing, the appellant uttered these words: "I hope this fucking guy died a slow painful death." Sgt Gobin described the reaction of those women, upon hearing the appellant's comment, as one of "awe" as they turned to look at the appellant. Record at 68. The appellant relies on the testimony of his friend and fellow ceremonial guard member, Lance Corporal (LCpl) Mowrey, who expressed doubts that any funeral attendee heard the appellant's comment. Id. at 171-72.

The elements of the offense of disorderly conduct are: (1) the accused was disorderly on board ship or in some other place; and (2) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. Manual for Courts-Martial, United States (2000 ed.), Part IV, ¶ 73b. Disorderly conduct is "conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of a contentious or turbulent character." Id., Part IV, ¶ 73c(2).

Given the dignity commonly expected at a service member's funeral and the respect due to his or her memory and grieving family and friends, we are confident that a reasonable fact-finder could find that the appellant's conduct so profoundly demeaned the occasion that the women who heard his comments were disturbed and resentful, and that his conduct brought discredit to the Marine Corps. A reasonable factfinder could therefore conclude that the elements of the offense of disorderly conduct were proven beyond a reasonable doubt, and we find the evidence on this offense to be legally sufficient. We have also weighed the evidence and are convinced beyond a reasonable doubt of the appellant's guilt. We find the evidence factually sufficient.

Convening Authority's Action

In his next assignment of error, the appellant notes, and the Government concedes, that the SJAR incorrectly indicated a finding of guilty to Specification 1 of the Additional Charge. The CA's action and promulgating order repeated that error. The appellant asserts that, as a result, the CA must have believed that the appellant was guilty of wrongfully using ecstasy on divers occasions when he considered a clemency petition seeking disapproval of the bad-conduct discharge. According to this argument, since the CA approved the sentence, including a bad-conduct discharge, he must not have given fair consideration to the clemency petition. The appellant also argues that the failure of the CA to state in the action that he specifically considered the clemency petition indicates that the CA did not consider it at all. As relief, the appellant asks this court to set aside his sentence and order a new SJAR and action.

We note that the trial defense counsel received his copy of the SJAR but made no objection to its contents, either in a response to the SJAR or in his clemency submission. Instead, he submitted a petition for clemency attacking the credibility of the witnesses who testified at trial against the appellant and enclosing positive character statements from family, friends, and former employers of the appellant.

Failure to object to errors in the SJAR results in waiver of any claim of error in the absence of plain error. R.C.M. 1106(f)(6); United States v. Powell, 49 M.J.

460, 465 (C.A.A.F. 1998); United States v. Lugo, 54 M.J. 558, 560 (N.M.Ct.Crim.App. 2000). "To succeed under a plain error analysis, appellant has the burden of establishing that there was plain or obvious error that 'materially prejudiced' his 'substantial rights.'" United States v. Reist, 50 M.J. 108, 110 (C.A.A.F. 1999)(quoting Art. 59(a), UCMJ). Moreover, when raising error in the post-trial review process, in addition to alleging error, an appellant must allege prejudice as a result of the error, and must show what he would do to resolve the error if given an opportunity. United States v. Wheelus, 49 M.J. 283, 288 (C.A.A.F. 1998).

We find no plain error. The CA stated in the action that he considered not only the SJAR but also the record of trial, in which the withdrawal and dismissal of Specification 1 under the Additional Charge were correctly recorded. The failure to object to the misstatement in the SJAR indicates that the appellant and his counsel considered the error to be a minor one unlikely to affect the CA's action. Finally, even if the SJAR had correctly stated the findings in regard to this specification, we are convinced that the CA would not have approved a sentence less than the relatively light punishment adjudged by the members, where the appellant was found guilty of distributing ecstasy on divers occasions to fellow Marines in the barracks and engaging in disorderly conduct at the funeral of a deceased Marine. Finding no plain error, we conclude this error was waived.

Although we find no prejudice to the appellant in the SJAR's error, he is nonetheless entitled to accurate official records concerning his court-martial. United States v. Crumpley, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We will direct in our decretal paragraph that the supplemental court-martial order accurately reflect that Specification 1 of the Additional Charge was withdrawn and dismissed.

We also find no prejudicial error in the failure of the CA's action to mention the appellant's clemency petition. A convening authority is not required to list all matters he or she considered before taking action in a case. United States v. Doughman, 57 M.J. 653, 655 (N.M.Ct.Crim.App. 2002)(citing United States v. Stephens, 56 M.J. 391, 392 (C.A.A.F. 2002)). In the absence of evidence to the contrary, we will presume that the CA considered clemency matters submitted by the appellant prior to taking action. Doughman, 57 M.J at 655 (citing United States v. Zaptin, 41 M.J. 877, 881 (N.M.Ct.Crim.App. 1995)).

Sentence Severity

We have considered the remaining assignment of error that the sentence is inappropriately severe and find it to be without merit. We specifically find that the sentence is appropriate for this offender and his offenses. See United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988); United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

Accordingly, the findings and sentence, as approved by the convening authority, are affirmed. We direct that the supplemental court-martial order reflect that Specification 1 of the Additional Charge was withdrawn and dismissed.

For the Court

R.H. TROIDL
Clerk of Court

Appendix AAA

UNITED STATES, Appellee

v.

Michael G. TILMAN
Aviation Structural Mechanic Airman Apprentice (E-2),
U.S. Navy

No. 05-0353/NA

UNITED STATES COURT OF APPEALS FOR
THE ARMED FORCES

Crim. App. Dkt. No. 200100193

September 11, 2006, Ordered

Counsel for Appellant: LT Brian L. Mizer, JAGC, USN.

Counsel for Appellee: MAJ Kevin C. Harris, USMC.

On consideration of the granted issue in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in *United States v. Moreno*, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix BBB

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER D.A. WAGNER R.W. REDCLIFF

UNITED STATES

v.

Michael G. TILMAN
Aviation Structural Mechanic Airman Apprentice (E-2),
U.S. Navy

NMCCA 200100193 Decided 10 March 2005

Sentence adjudged 24 April 2000. Military Judge: W. Lietzau. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, Naval Air Warfare Center Aircraft Division, Patuxent River, MD.

LT REBECCA SNYDER, JAGC, USNR, Appellate Defense Counsel
LT COLIN KISOR, JAGC, USNR, Appellate Defense Counsel

LT DONALD PALMER, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Judge:

The appellant filed a motion with this court on 31 January 2005 for en banc reconsideration of its prior unpublished decision in *United States v. Tilman*, No. 200100193, unpublished op. (N.M.Ct.Crim.App. 19 Jan 2005). The Government did not file a responsive pleading. The motion for reconsideration en banc is denied. This court has reconsidered our decision in-panel in light of the appellant's motion. *See* N.M.CT.CRIM.APP. RULE 6-1c. As a result of our in-panel reconsideration, we affirm our previous decision. It is clear from the tone and substance of the appellant's 24-page motion for reconsideration that appellate defense counsel misconstrued portions of our opinion. To ensure that there is no confusion regarding our decision, it is supplemented by this opinion.

Incomplete Record of Trial

The appellant raises no specific prejudice resulting from any of the omissions in the record of trial. In his request for reconsideration, the appellant asserts that our earlier opinion shifted the burden with regard to prejudice to the appellant. We disagree. We find that the omissions in the record of trial are not substantial and, therefore, no

presumption of prejudice exists. *United States v. Santoro*, 46 M.J. 344, 346 (C.A.A.F. 1997).

Specifically, the appellant claims that a significant portion of the testimony of a government witness is missing due to a tape change at page 472. The record does not reveal a substantial gap, however, and the missing portion appears to be limited to the trial counsel asking the witness if the victim asked some person or persons to return later that night. The thrust of the question and answer exchange is the opinion of the witness that the victim "was in no condition to ask anybody to come." Record at 472. The trial defense counsel objected to the opinion and the military judge sustained the objection. *Id.* The appellant advances no additional subject matter that is missing. Assuming *arguendo* that this omission was substantial, the presumption of prejudice is easily overcome by the extensive cross-examination and redirect examination that followed on the issues of who left the party, when they left the party, and what was said.

The appellant also claims that a substantial portion of the discussion regarding the judge's instructions on findings is missing due to a tape change on page 815 of the record. There is no indication in the appellant's briefs or in the record to suggest that the missing dialogue is substantial. Assuming *arguendo* that this omission is substantial, the presumption of prejudice is again easily overcome by the trial defense counsel's statement on page 848 and again on page 903 of the record that there were no objections to the final instructions given to the

members.

The appellant cites pages 687, 692, 807, and 811 of the record of trial where the court reporter noted there were inaudible responses. There is no claim that any of these amount to substantial omissions, and, in each case, the inaudible portions are clearly minor omissions given their context in the record of trial. Of note, all four minor omissions were parts of sentences of a trial defense counsel and none were testimony.

Lack of Speedy Review

The appellant avers that this court's previous opinion is at odds with binding precedent established by our superior court in *Diaz v. Judge Advocate General of the Navy,* 59 M.J. 34 (C.A.A.F. 2003). This is a misreading of our previous opinion. Each appellant is entitled to an "appellate defense counsel who is able to represent him in both a competent and timely manner." *Diaz,* 59 M.J. at 38. Additionally, the government has a "statutory duty" to provide such counsel under Article 70, Uniform Code of Military Justice, 10 U.S.C. § 870.

We have considered all the facts and circumstances surrounding the delay in the appellant's case in light of Articles 59(a) and 66(c), UCMJ; *United States v. Toohey,* 60 M.J. 100 (C.A.A.F. 2004); *Diaz*; and *United States v. Tardif,* 57 M.J. 219 (C.A.A.F. 2002). We do not find any prejudice or any other harm suffered by the appellant due to the delay in his case or any other basis for affording relief. There is no evidence that the

appellant requested speedy review at any stage of the post-trial processing of his court-martial. We also have determined that the findings and sentence, as approved by the convening authority, should be approved in this case. While the timeliness of the post-trial processing of this case was less than optimal, we do not find the delay to be excessive considering the length and complexity of the record of trial, the issues raised by the appellant, and all other circumstances relating to appellate review of this case.

In our previous opinion, we cautioned counsel that, in advancing the issue of appellate defense attorney workload, collateral duties must give way to the ethical duty to represent an individual client. We stand by this conclusion. We also urge counsel to apprise their supervisory attorneys of their backlog in any case where they feel they cannot undertake effective representation in a timely fashion.

Trial Counsel's Closing Argument

The appellant contends that the trial counsel impermissibly commented on the appellant's silence at trial. We disagree.

The trial counsel began closing argument on the merits by stating:

> Mr. President, members, do you know why the government negotiated at all with AV3 Kepler, an accomplice of the accused, a

> co-conspirator of the accused? The government did because before there was any pretrial agreement, before there were any negotiations, Petty Officer Kepler talked to NCIS and told NCIS the truth.

Record at 849. Trial defense counsel objected on the grounds that the trial counsel was arguing evidence not before the court. The military judge, *sua sponte*, stated that the argument was an impermissible comment on the appellant's right to remain silent. The trial defense counsel specifically stated that the defense did not seek mistrial and instead desired a curative instruction. The military judge stated that he proposed telling the members simply to ignore the trial counsel's comments and the trial defense counsel agreed. The members were so instructed. Record at 849-50.

The trial counsel then began closing argument anew by stating:

> Mr. President, members, you heard from Petty Officer Kepler, AV3 Kepler. His testimony is essentially uncontested, or uncontradicted.

Record at 852. Not only was there no objection to this argument, but trial defense counsel later stated in argument on findings:

> [Trial counsel] said that the testimony of Petty Officer Kepler is essentially

> uncontroverted, uncontradicted. That is not entirely true, but for the most part there are things in his testimony that are relatively uncontradicted and uncontroverted.

Record at 877.

It is well-settled law that the failure of the trial defense counsel to object to the argument of trial counsel constitutes forfeiture of the issue on appeal in the absence of plain error. RULE FOR COURTS-MARTIAL 919(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.); *see United States v. Ruiz,* 54 M.J. 138, 143 (C.A.A.F. 2000); *United States v. Ramos,* 42 M.J. 392, 397 (C.A.A.F. 1995). In order to show plain error, the appellant must demonstrate that an error was substantial and had a prejudicial impact on the outcome of the trial. *Ruiz,* 54 M.J. at 143; *United States v. Fisher,* 21 M.J. 327, 328 (C.M.A. 1986). We may award relief on an otherwise forfeited error only where the error seriously affects the fairness, integrity, or public reputation of the court-martial. *Johnson v. United States,* 520 U.S. 461, 467 (1997). This power is to be used sparingly, reserved for those cases where a miscarriage of justice would otherwise result. *United States v. Frady,* 456 U.S. 152, 163 n.14 (1982).

Plain error in this case would only be raised if the trial counsel's argument amounted to a comment on the appellant's failure to testify at trial or execution of his

right to remain silent. The trial counsel's argument was neither. It was simply fair and accurate comment on the state of the evidence in the case. This is buttressed by the fact that the military judge, already sensitive to this issue, did not take action sua sponte. It is further supported by the fact that the trial defense counsel not only failed to object, but also, in argument, agreed with the trial counsel that the testimony was, for the most part, uncontradicted and uncontroverted.

Finally, in the motion for reconsideration, the appellant cites *United States v. Dennis,* 39 M.J. 623, 625 (N.M.C.M.R. 1993) as supporting authority that this court should have conducted further analysis of the argument of trial counsel in order to determine whether he was entitled to relief. However, the *Dennis* court ultimately held that the identical language used by the trial counsel in this case did not constitute a reference on the accused's right not to testify:

> Many cases support the conclusion that a bare statement to the effect that the prosecution's evidence generally, or that of a particular witness or witnesses, is uncontradicted or undenied, is not an improper reference to the accused's refusal to testify. Annotation, *Comment On Argument By Court Or Counsel That Prosecution Evidence Is Uncontradicted As Amounting to Improper Reference to Accused's Failure To Testify*, 14 A.L.R. 3rd 723, 763. Also, many state and federal

> courts, when confronted with a situation where an argument is made that evidence for the prosecution is uncontradicted or undenied, have found that such comments do not constitute an improper reference to the accused's failure to testify and simply reflect the prosecution's description on the weight and force of its own evidence or the credibility of its witnesses. *Id.* at 769 and August 1992 Supplement at 72-75.

Dennis, 39 M.J. at 625.

This issue was, and remains, without merit. Thus, the appellant is entitled to no relief.

Conclusion

Accordingly, the findings of guilty and sentence, as approved by the convening authority and by this court in our earlier decision, are again affirmed.

For the Court

R.H. TROIDL
Clerk of Court

Appendix CCC

UNITED STATES, Appellee

v.

Michael A. WHITE
Fire Control Technician Third Class (E-4), U.S. Navy,
Appellant

No. 05-0592/NA

UNITED STATES COURT OF APPEALS FOR
THE ARMED FORCES

Crim. App. Dkt. No. 200101242

September 11, 2006, Ordered

Counsel for Appellant: LT Richard H. McWilliams, JAGC, USNR.

Counsel for Appellee: Captain Roger E. Mattioli, USMC.

On consideration of the granted issue, in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in United States v. Moreno, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix DDD

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER D.A. WAGNER R.W. REDCLIFF

UNITED STATES

v.

Michael A. WHITE
Fire Control Technician Third Class (E-4), U.S. Navy

NMCCA 200101242 Decided 29 April 2005

Sentence adjudged 2 November 2000. Military Judge: K.J. Allred. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Yokosuka, Japan.

LT MICHAEL J. NAVARRE, JAGC, USNR, Appellate Defense Counsel
LCDR ERIC MCDONALD, JAGC, USN, Appellate Defense Counsel

LtCol JOHN KENNEDY, USMCR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

REDCLIFF, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of willful damage to non-military property and indecent assault, in violation of Articles 109 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 909 and 934. Pursuant to his pleas, the appellant was also convicted of a two-day unauthorized absence, violating a lawful liberty risk order, and fleeing apprehension, in violation of Articles 86, 92, and 95, UCMJ. The appellant was sentenced to reduction to pay-grade E-1, confinement for 3 years, total forfeiture of pay and allowances, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have carefully examined the record of trial and the appellant's four assignments of error contending that the evidence is legally and factually insufficient to sustain his conviction for willful damage to non-military property, that the evidence is factually insufficient to support his conviction for indecent assault, that he was denied a speedy trial in violation of Article 10, UCMJ, and that his sentence is inappropriately severe.[1] We

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[1] On 24 September 2004, the appellant requested

have also considered the Government's response and the appellant's reply brief. We conclude that the findings of guilty to willful damage to non-military property must be set aside and dismissed. After taking corrective action in our decretal paragraph, we conclude that the remaining findings and the reassessed sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Sufficiency of Evidence--Willful Damage to Non-military Property

In the appellant's first assignment of error, he asserts that the evidence is both legally and factually insufficient to prove beyond a reasonable doubt that he willfully damaged non-military property in violation of Article 109, UCMJ. The appellant avers that this court should set aside the findings of guilty to Charge IV and its Specification. We agree that the evidence is factually insufficient in this case.

The facts regarding this offense are largely undisputed. On 6 July 2000, Mrs. "Y," a Japanese national, was driving her Toyota on Okinawa. As she approached an intersection at a speed of about 20 kilometers per hour,

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expedited appellate review of his case, which request was renewed on 18 March 2005 while this decision was pending final editing. On 5 November 2004, the appellant requested oral argument. That motion is hereby denied.

she made eye contact with the appellant, who was standing at the side of the street. After the appellant smiled at her, Mrs. Y believed that he would wait to cross the street until her vehicle had passed. Instead, the appellant walked from the sidewalk and "jumped" onto the "bonnet" of her vehicle. Record at 142. The Toyota's hood, windshield, and front fender sustained minor damage, with repairs costing 90,000 yen, or about $500.00. Security personnel from a nearby Marine Corps post responded to the scene and summoned medical care for the appellant, who was found unconscious and appeared seriously injured as a result of the collision.

In his defense, the appellant testified that on 6 July 2000 he had been drinking alcohol after becoming upset about an argument with his wife. Distraught, the appellant jumped in front of the vehicle driven by Mrs. Y in hopes of being struck by it and injured. Misjudging its speed, he was still airborne when he landed on top of its hood, causing the damage alleged. The appellant denied any intention of damaging the property, but rather admitted his sole purpose of jumping in front of the car was to cause injury to himself.

This court has an independent statutory obligation to review each case de novo for legal and factual sufficiency, and may substitute its own judgment for that of the trial court. *See* Art. 66, UCMJ; *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a

reasonable fact-finder could have found that all the essential elements were proven beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "The test for factual sufficiency 'is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,' [this] court is 'convinced of the [appellant's] guilt beyond a reasonable doubt.'" *Reed*, 54 M.J. at 41 (quoting *Turner*, 25 M.J. at 325); *see* Art. 66(c), UCMJ. In exercising the duty imposed by this "awesome, plenary, *de novo* power," *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990) (emphasis in original), this court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge or court-martial members. Art. 66(c), UCMJ.

To sustain a conviction for willful damage to non-military property, the Government must prove the following elements:

> (a) That the accused willfully and wrongfully destroyed or damaged certain personal property in a certain manner;
>
> (b) That the property was that of another person; and
>
> (c) That the property was of a certain value or the damage was of a certain amount.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 33b(2).

To constitute an offense under Article 109, UCMJ, the damage inflicted must be willful, that is, "intentional." MCM, Part IV, ¶ 33c(2); *see United States v. Bernacki*, 33 C.M.R. 173, 176 (C.M.A. 1963). And even if the act causing the damage was intentional, such an act does not establish, on its own, that the appellant intended to damage the property. *See United States v. Yoakum*, 8 M.J. 763, 766-67 (A.C.M.R. 1980)(affirming the accused's conviction for damaging three vehicles while driving enraged and at a high rate of speed, based on circumstantial evidence that demonstrated the damage to the vehicles was the result of willful action).

At trial and on appeal, the Government relies upon circumstantial evidence to sustain its burden of proving the appellant's requisite intent and cites *United States v. Hoyt,* 48 M.J. 839 (N.M.Ct.Crim.App. 1998)(holding the accused's plea to Article 109, UCMJ, to be provident where he threw a bicycle out of rage and admitted that he did so with the purpose of breaking something). While we agree with the Government's contention that an accused's intent can be proven by circumstantial evidence, we conclude that the application of this principle to the facts here does not support the conclusion that the appellant intended to damage Ms. Y's car.

In *United States v. Johnson,* 24 M.J. 101 (C.M.A. 1987),

the accused was convicted of the sabotage of two RF-4 aircraft, under 18 U.S.C. § 2155, and violation of Article 108, UCMJ, willfully damaging the same aircraft by placing bolts in their engine intakes. The Air Force Court of Criminal Review set aside the conviction but was reversed by the Court of Military Appeals (CMA) on the issue of specific intent. In affirming Johnson's conviction of sabotage, the CMA held that the "intent" required under the statute meant the accused must have known:

> 'that the result is practically certain to follow', regardless of any desire, purpose, or motive to achieve the result. Thus, § 2155(a) would be satisfied if someone acted when he knew that injury to the national defense would be the almost inevitable result, even though the reason for his action had nothing to do with national defense.

Id. at 105.

The *Johnson* court further opined that an intent to cause certain results can be established by evidence that such results flow "naturally and probably from the action that was taken." *Id.* Thus, Johnson's volitional act of placing bolts in the engine intakes gave rise to a permissive inference that he acted with the knowledge of the likely consequences of doing so, and thus, intended such consequences. *Id.* However, the CMA further noted that because only a permissive inference is involved,

specific "intent is lacking unless the factfinder determines not only that the prohibited results were highly foreseeable, but also that the accused, in fact, knew they were almost certain and nonetheless went ahead." *Id.* at 105-06. [2]

We hold that the evidence here is legally sufficient to sustain the appellant's conviction for violating Article 109, UCMJ. The Government presented sufficient evidence that a reasonable person might conclude that the appellant was guilty. However, we also hold that the evidence is factually deficient because, in our view, there is insufficient proof of the appellant's *mens rea.* We base this conclusion on our assessment of the evidence,

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[2] Few cases address the specific intent element of Article 109, UCMJ. Fewer cases examine the interplay of "motive," "purpose," "intended consequence," and "proximate cause" as these relate to the concept of "willfulness." Among these cases, see *United States v. Priest,* 7 M.J. 790 (N.C.M.R. 1979)(holding that the accused's plea to Article 109, UCMJ, was improvident where he admitted only that his operation of a boat in shallow water was reckless); *United States v. Garcia*, 29 M.J. 721 (C.G.C.M.R. 1989)(holding that the accused's plea to Article 109, UCMJ, was improvident where he admitted only that he broke a glass display case to steal jewelry located therein but that he did not intend to damage the display case); and, *Hoyt,* 48 M.J. 839 (N.M.Ct.Crim.App. 1998)(questioning the validity of, but not overturning, *Priest*).

both direct and circumstantial, regarding the appellant's intent: namely, the appellant's testimony that he had no intention of damaging the vehicle itself, coupled with unrebutted evidence of the appellant's emotional distress and his intoxication at the time of the incident, along with the relatively low speed of the vehicle upon impact.[3]

Considering all of these circumstances in their context, we are not convinced that the appellant was aware that damage to the vehicle was "almost certain" but nonetheless went ahead in his attempt to injure himself. *See Johnson,* 24 M.J. at 105-06. Nor do we find that the appellant knew that damage to the vehicle was highly foreseeable even though his volitional actions were clearly the proximate cause of the resulting damage. *See Johnson,* 24 M.J. at 105. Therefore, we are not convinced beyond a reasonable doubt that the appellant is guilty of violating Article 109, UCMJ, and will take corrective action in our decretal paragraph.

Sufficiency of Evidence–Indecent Assault

In his second assignment of error, the appellant contends that the Government failed to prove beyond a reasonable doubt that he sexually assaulted Airman "W" because her testimony was unreliable and uncorroborated. The appellant avers that this court should disapprove the findings of guilty to Charge VI and its Specification.

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[3]Mrs. Y testified that she was driving at 20 km/hr at the time of the collision, which converts to about 12.5 mph.

We disagree.

At trial, Airman W testified that she met the appellant at a Transient Personnel Unit and that he offered to help her find a place to live. At his invitation, Airman W agreed to pay $75 rent per month and moved into the off-base residence occupied by the appellant, his wife, and other boarders. Airman W indicated that some time later the appellant told her he was "interested" in her and would rub her feet. On the night of 4 July 2000, Airman W returned to the residence at approximately 2300, after attending a barbecue party. She testified that she tried to sleep in her third-floor bedroom but was unable to sleep because it was too hot. She then went to the second-floor living room and fell asleep on the sofa. Sometime afterwards, she awoke when she felt someone touch her hips and feel her feet. Suddenly, her shorts were "ripped" off, and she looked up and saw the appellant. Record at 110-111. The appellant then got on top of her and put his fingers inside her vagina for "a couple of seconds." *Id.* at 111. The appellant then asked Airman W if she wanted him to stop. She said yes and told him to get off of her "5 or 6 times" before he complied. *Id.* at 112. Airman W remained on the sofa following the assault and did not know where the appellant went afterwards.

On the following day, Airman W testified that she was upset at work and, when asked why, told her leading petty officer (LPO) about the incident. She also testified that she asked her LPO not to report it to their chain of command because she was uncomfortable with the

situation. Airman W further testified that she also told a friend (someone named "Brad" who had lived with her and the appellant) about the assault after learning that the appellant was in the brig for other unrelated offenses. Finally, Airman W conceded several differences in her statement to the Naval Criminal Investigative Service but stated that this was because she was uncomfortable talking about the incident with a stranger.

The defense vigorously cross-examined Airman W and sought to discredit her by highlighting inconsistencies in her testimony concerning details of the assault. The defense also presented evidence on the merits by calling Seaman "F," who testified that he was a frequent overnight houseguest at the appellant's residence. Seaman F testified that he saw the appellant at his home between 2230 and 2300 on 4 July 2000, and that the appellant said he was sick and was going to go to sleep. Seaman F then went up to his third-floor bedroom and fell asleep around 0030. Finally, Seaman F testified that he never saw Airman W at the house that evening.

The defense next called Fireman "M," who testified that he was a former boyfriend of Airman W and that she told him she wanted to get out of the Navy. He further testified that she had asked him if she could get out of the service by getting pregnant. Fireman M concluded his testimony by opining that Airman W was an untruthful person.

Lastly, the appellant took the stand in his own defense and testified that the alleged assault never happened.

The appellant asserted that he was ill with flu-like symptoms on the night it purportedly took place, so much so that he went to the emergency room at about 1700 on the following day and was prescribed antibiotics. The appellant asserted, without further explanation, that he believed Airman W fabricated the assault to get out of the Navy and chose to "pin it" on him because he was in the brig for other offenses.

Again, "[t]he test for factual sufficiency 'is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,' [this] court 'is convinced of the [appellant's] guilt beyond a reasonable doubt.'" *Reed*, 54 M.J. at 41 (quoting *Turner*, 25 M.J. at 325); *see* Art. 66(c), UCMJ. Reasonable doubt does not require that the evidence presented be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). Further, this court may believe one part of a witness' testimony and disbelieve other aspects of his or her testimony. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). Our task here is to determine whether Airman W's testimony was sufficient to convict the appellant.

We have carefully considered the evidence presented at trial, keeping in mind that the fact-finder saw and heard all the witnesses. Art. 66(c), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The appellant's allegations regarding Airman W's credibility and possible prior inconsistent statements were fully developed at trial and argued ably before the trial court. After careful review of the record, we find that Airman

W's testimony was credible. We conclude that the evidence presented was both legally and factually sufficient. We are also convinced beyond a reasonable doubt of the appellant's guilt. We, therefore, find this assignment of error to be without merit, and decline to grant the requested relief.

Remaining Assignments of Error

Finally, we considered the appellant's remaining assignments of error contending that he was denied a speedy trial under Article 10, UCMJ and that his sentence is inappropriately severe. We find no merit in these assertions and decline to provide relief.

Conclusion

Charge IV and its Specification are set aside and dismissed. We affirm the remaining findings as approved by the convening authority. After reassessing the sentence pursuant to the principles of *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986), we affirm the sentence approved by the convening authority.

Senior Judge CARVER and Judge WAGNER concur.

For the Court
R.H. TROIDL
Clerk of the Court

Appendix EEE

UNITED STATES, Appellee

v.

Kykaiya A. Williams, Lance Corporal (E-3), U.S. Marine Corps, Appellant

No. 06-0212/MC

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Crim. App. Dkt. No. 200202264

September 11, 2006, Ordered

Counsel for Appellant: Captain Rolando Sanchez, USMC.

Counsel for Appellee: LT TyQuill R. Booker, JAGC, USNR.

On consideration of the granted issue, in light of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), and United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006), assuming that Appellant was denied his due process right to speedy post-trial review and appeal, that error was harmless beyond a reasonable doubt. Accordingly, it is, by the Court, this 11th day of September, 2006,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,*

/s/ William A. DeCicco
Clerk of the Court

* CRAWFORD, Judge (concurring in the result):

I concur in the result in this case but disassociate myself from the reasoning in United States v. Moreno, 63 M.J. 129, 144 (C.A.A.F. 2006) (Crawford, J., concurring in part and dissenting in part), and United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006) (Crawford, J., concurring in part and in the result).

Appendix FFF

IN THE U.S. NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

C.W. DORMAN, W.L. RITTER, J.D. HARTY.

UNITED STATES

v.

Kykaiya A. Williams, Lance Corporal (E-3),
U.S. Marine Corps

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

NMCCA 200202264 Decided 19 October 2005

Sentence adjudged 27 September 2001.
Military Judge: R.C. Harris.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.

COL. KATHERINE GUNTHER, USMCR, Appellate Defense Counsel.

LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel.

HARTY, Judge:

Contrary to his pleas, the appellant was found guilty by a general court-martial, comprised of officer and enlisted members, of one specification of maiming in violation of Article 124, Uniform Code of Military Justice, 10 U.S.C. § 924. The adjudged sentence includes 5 years confinement, total forfeiture of pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged, but reduced the post-confinement forfeitures to "two-thirds pay per month."

We have carefully considered the record of trial, the appellant's 6 assignments of error and his declaration under penalty of perjury dated 29 December 2003, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Effective Assistance of Counsel

In his first assignment of error, the appellant asserts that his defense team provided ineffective assistance by advising him not to testify on the merits, not informing him of his right to submit post-trial clemency matters, by not providing him a copy of his record of trial as

requested, and by requesting that the military judge not instruct the members of certain lesser included offenses of maiming. Appellant's Brief of 31 Mar 2004 at 5; Appellant's Motion to Attach of 31 Mar 2004. For his second assignment of error, the appellant asserts that he was denied effective assistance of counsel because his defense team failed to convince the court that he acted in self-defense. Appellant's Brief at 9. We do not find any deficient performance by counsel.

The U.S. Supreme Court has articulated two prongs that an appellate court must find before concluding that relief is required for ineffective assistance of counsel -- deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The proper standard for attorney performance is that of reasonably effective assistance. *Id.* Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* This constitutional standard applies equally to military cases. *United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987). In order to show ineffective assistance, however, an appellant must surmount a very high hurdle. *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997). We do not look at the success of a trial theory or tactical decision, but whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time. *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001). The appellant's assertions of ineffective assistance of counsel appear to be nothing more than displeasure with the trial outcome. We need

not order a hearing pursuant to *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), since these matters may be resolved based on the "appellate filings and the record." *Id.* We will address each of the appellant's concerns.

The appellant contends that trial defense counsel "refused to allow LCpl Williams to testify in his own defense." Appellant's Brief at 6. An accused has the constitutional right to testify in his own defense. *Rock v. Arkansas*, 483 U.S. 44, 51, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987); *Nix v. Whiteside*, 475 U.S. 157, 162, 89 L. Ed. 2d 123, 106 S. Ct. 988 (1986); *Harris v. New York*, 401 U.S. 222, 225, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971). The appellant states in his sworn declaration, however, that he wanted to testify but his counsel advised him not to testify. This is qualitatively different than being denied the opportunity to testify, as the appellant now represents. Whether an accused accepts his counsel's advice or not is completely up to that accused. The appellant does not state that he insisted on testifying against his counsel's advice. Now, the appellant is unhappy with that advice. The appellant has not shown that counsel's advice was an objectively unreasonable strategic decision chosen from the alternatives available at the time.

The appellant also asserts that he was not informed of his right to submit post-trial matters in clemency, and that counsel failed to provide him with a copy of the record of trial. On 27 September 2001, the appellant signed an Appellate and Post-Trial Rights

acknowledgement that states in pertinent part as follows: I acknowledge: (1) that prior to adjournment of my court-martial, I was provided with the above written advice; (2) **that I have read and understand my post-trial and appellate rights**; (3) **that I have discussed them with my lawyer prior to signing this form**; and (4) that the military judge will discuss my appellate rights with me on the record prior to adjournment of the court, if I so desire.

Appellate Exhibit XXXII at 2. (Emphasis added).

AE XXXII states in part that the appellant understood and discussed with his counsel the following: "You have the right to submit matters to the convening authority before that officer takes action on your case." *Id.* at 1. The military judge confirmed that before signing the AE XXXII the appellant and his counsel had discussed the contents of the document and that the appellant understood the contents of the document. Record at 405. That same document states, and the military judge confirmed, that the appellant wanted his copy of the record of trial served on his individual military counsel. *Id.*; AE XXXII. The record on appeal clearly disputes the appellant's declaration under penalty of perjury on these issues.

As to his counsel's tactical decision to ask the military judge not to instruct on lesser included offenses of maiming, we merely note that this "all or nothing" approach is squarely within the realm of trial tactics which we will not second guess without a clear showing

that it constitutes deficient performance. We find no merit in the appellant's contention that this was a "failure" on the part of his counsel.

Finally, the appellant asserts as his second assignment of error that "because the defense team failed to act in [the appellant's] best interests, the evidence presented at trial . . . failed to convince the members that [the appellant] was acting in his own defense." Appellant's Brief at 9. The appellant then recites evidence from the record of trial that argues his self-defense theory.[1] *Id.* at 9-11. The evidence of self-defense was clearly presented, and the military judge instructed the members on self-defense. Appellate Exhibit XX at 5. The appellant has not shown that his defense team's performance was objectively unreasonable in strategy, tactics, or presentation. We will not speculate or assume that any prejudice could have resulted from the defense team's performance in this matter. We find that the appellant has not met his burden of demonstrating ineffective assistance of counsel and decline to grant relief on this basis.

Legal and Factual Sufficiency

For his third assignment of error, the appellant asserts the evidence in this case is factually and legally insufficient to support a conviction for maiming.

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[1] The appellant also provides evidence found in the Article 32, UCMJ, hearing record that was not submitted at trial.

Specifically, the appellant asserts that the evidence does not support the specific intent to injure and the extent of injuries falls short of that required for maiming. Appellant's Brief at 11-13. We disagree.

We are charged with determining both the legal and factual sufficiency of the evidence presented at trial. Art. 66, UCMJ; *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Id.* In contrast, the factual sufficiency test is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the [members of the reviewing court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *Id.* at 325. In making these determinations, we are mindful that reasonable doubt does not mean the evidence must be free of conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). Furthermore, as "factfinders [this court] may believe one part of a witness' testimony and disbelieve another." *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999).

There are three elements to maiming:

(1) That the accused inflicted a certain injury upon a certain person;

(2) That this injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor by the injury to an organ or member; and

(3) That the accused inflicted this injury with an intent to cause some injury to a person.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, P50b. The appellant asserts the evidence falls short as to the second and third elements. We will discuss each of these elements in reverse order.

1. Intent to Cause Some Injury

The appellant asserts that, as to the third element, the evidence is legally and factually insufficient to establish that he intended to injure Lance Corporal (LCpl) P. Instead, he asserts the evidence establishes that he merely intended to "extricate himself from the grasp of [LCpl P] who . . . had thrown him over his shoulder and was spinning him around and slamming him into a brick wall." Appellant's Brief at 11 (citing Record at 219, 222, 239, 273, 289). A reading of the entire record paints a different picture.

LCpl P was fond of wrestling and shadow boxing with other unit members, and that was his manner of playful interaction. He had wrestled and shadow boxed with the appellant before, and it was always in fun. While waiting

in line outside the call center, LCpl P playfully pushed or tapped the appellant on the shoulder from behind and said "I told you to watch your back." In what appeared to be playful interaction, the appellant knocked LCpl P's cigarette out of his hand or mouth twice, and the two Marines began to shadow box - neither actually touched the other. Everyone present took this as two Marines just having fun. LCpl P went into a wrestling stance and the appellant went into a warrior stance. LCpl P picked the appellant up and either put him on his shoulder, put him in a fireman's carry, or held him cross-body. LCpl P had a big smile on his face but the appellant did not. Here, the testimony diverts. LCpl P testified that he put the appellant up against a brick wall to get a better grip. Eye witnesses confirm LCpl P's version of events. However, one eye witness, Private First Class (PFC) W, testified that LCpl P "banged" the appellant's back against the brick wall six or seven times. Record at 289. It was during the contact with the brick wall or shortly thereafter that the appellant pulled a knife and stabbed LCpl P twice in the back. LCpl P spun the appellant around once or twice then safely put him down on his feet. Only when he saw the blood did LCpl P realize he had been stabbed.

Lieutenant Commander (LCDR) K, a general surgeon with five years of surgical experience, testified that:
In this patient, the -- [the knife] went through the fat, through the muscle, in between the ribs, and ventured into the lung cavity. So my estimation, is that the knife was *pushed with a significant amount of force*. That's my estimate based on the nature of the injury, such that

it went deep enough to at least go to the hilt of the blade.

Record at 196. (Emphasis added).

Considering this evidence in the light most favorable to the prosecution, a reasonable factfinder could have found beyond a reasonable doubt that the appellant stabbed LCpl P with the intent to cause some injury. While the appellant wanted out of LCpl P's grasp, he attempted to achieve that end by inflicting sufficient injury to force his release. After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the accused's guilt as to this element beyond a reasonable doubt.

2. Measure of the Injury

The appellant asserts that, as to the second element, the evidence is legally and factually insufficient to establish that the injury was serious enough to qualify as maiming. The appellant claims that if the victim makes a full recovery from the injuries or if the scars are not easily detectable to the casual observer the injury is not sufficient. Appellant's Brief at 12-13. We disagree.

LCpl P was taken by an emergency helicopter to a local hospital where he remained for five days. LCpl P then went on 30 days of convalescent leave followed by 30 days of limited duty. LCDR K testified concerning LCpl P's injuries based on a personal examination of the LCpl

and review of the LCpl's medical records. He testified in part that:

[LCpl P] sustained two stab wounds, one directly to the back on the right side . . . In terms of the internal damage . . . one knife wound went through the chest wall, through the muscles that make up the abdominal wall and in between the ribs and punctured the diaphragm and entered into the liver. . . . In addition to that. . . he punctured his lung. He collapsed his lung . . . The lung has now been scarred. Its been damaged. *So there's always the potential that the lung could collapse again.*

Record at 194-99 (emphasis added). On cross-examination, LCDR K admitted that LCpl P had made a full recovery, could stay in the Marine Corps, and could perform his military duties. *Id.* at 200-01.

LCpl P stated that he continued to have problems in the form of swollen scaring, trouble breathing, and "real bad cramps in the side." *Id.* at 231. He had attempted to participate in field exercises but collapsed from an inability to breath. He was evacuated from the field and it was determined the lung scar tissue had stretched, causing the problem. Although he was returned to full duty, LCpl P still could not participate in physical training with his unit. *Id.* at 232. LCpl P's doctor told him that he "should make a full recovery." *Id.* 400. As to LCpl P's scaring, he displayed those scars to the members. However, there is no description or photographs of the scars in the record. *Id.* at 233-34.

LCpl P stated that he will not be embarrassed to go out in public with his scars or to take his shirt off at the beach or pool. *Id.* at 240-41.

The appellant seeks to have this court apply the holding of *United States v. McGhee*, 29 M.J. 840 (A.C.M.R. 1989), *reversed on other grounds*, 32 M.J. 322 (C.M.A. 1991), to his case. In *McGhee*, the Army Court of Military Review made a factual determination that the impact scarring on the child victim's back and buttocks was not easily detectable to the casual observer. Applying that fact to its perception of the meaning of "disfigure", the court determined that the evidence of injuries in that case "fell beneath the threshhold for maiming." 29 M.J. at 841. This court later found the *McGhee* analysis to be fact-based and, therefore, limited in its application. *See United States v. Outin*, 42 M.J. 603, 607 (N.M.Ct.Crim.App. 1995). In *Outin*, we found based on photographs and testimony in the record that "the scars are clearly visible to a casual observer, they detract from [the victim's] comeliness and they are substantially permanent in nature." *Id.* at 607-08 (footnote omitted). In *United States v. Spenhoff*, 41 M.J. 772 (A.F.Ct.Crim.App. 1995), an accused found guilty of maiming argued that although permanent, the victim's injuries were not disfiguring because they were on a body part usually covered by clothing. An expert witness testified that the burned area was lighter than the surrounding skin and would probably never regain its natural color. Our sister court held that the law of maiming protects the integrity of the victim's entire

body, not just those parts routinely exposed to public view. *Id.* at 774.

When it comes to scarring or other permanent marks resulting from the injury, courts have consistently looked to the evidence of record to determine both visibility and permanency. Here, there is no evidence to review. There is no description of the scars and no photographs admitted as exhibits. Without such evidence we must hold that any external scarring resulting from the injury are insufficient to establish the second element of maiming based on disfigurement. That, however, does not end our analysis.

Disfigurement is only one of 3 alternative forms of maiming. As the elements of the offense make clear, an injury to an internal organ that seriously diminishes the victim's physical vigor is sufficient for maiming. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury of a substantially permanent nature. MCM, Part IV, P50c(1).

The lung scarring resulting from the stab wound has diminished LCpl P's vigor, partially disabled that organ, and is a serious injury and of a substantially permanent nature. MCM, Part IV, P50c(1). LCDR K testified that LCpl P's lung could collapse again as a result of the scar tissue left from the injury inflicted by the appellant. LCpl P collapsed during a field exercise after being determined fit for duty. That incident was the result of the lung scar tissue.

Considering this evidence in the light most favorable to the prosecution, a reasonable factfinder could have found that the lung injury was of a substantially permanent nature, and that the appellant was guilty of maiming beyond a reasonable doubt. After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant's guilt as to this element and this offense beyond a reasonable doubt.

Speedy Post-Trial Review

For his fourth assignment of error, the appellant asserts that he was denied speedy post-trial review. The appellant avers that this court should disapprove the adjudged punitive discharge and any confinement not served. Appellant's Brief at 13-14. We disagree.

In determining if post-trial delay violates the appellant's due process rights, we consider four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice."

Id. (quoting *United States v. Toohey*, 60 M.J. 100, 102 (C.A.A.F. 2004).

We accept the appellant's chronology and find that it took 329 days from date of trial to the convening authority's action and an additional 77 days before the case was docketed with this court. Appellant's Brief at 14. The Government's explanation for this delay includes the length of the record of trial, the nature of the charges, and the delay resulting from a misplaced appellate rights statement. This is not a sufficient explanation and we find that the delays are facially unreasonable, triggering a due process review.

Because we find the delays unreasonable and the explanations unacceptable, we look to the third and fourth *Jones* factors. The appellant did not assert his right to speedy post-trial review. His only suggestion of prejudice is that he will have served his confinement before this court acts. Our own review of the record does not reveal any evidence of prejudice to the appellant. While we do not condone the unexplained delays in this case, we conclude that there has been no due process violation resulting from the post-trial delay.

We are aware of our authority to grant relief under Article 66, UCMJ, but we decline to do so. *United States v. Oestmann*, 61 M.J. 103 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 102; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Failure to Give Instructions

For his final assignment of error,[2] the appellant asserts the military judge erred by denying the defense-requested instruction on the use of excessive force to deter, and by failing to give lesser included offense (LIO) instructions even though the appellant requested they not be given. Appellant's Brief at 17. The Government takes the position that the "excessive force to deter" instruction was not raised by the evidence and therefore inappropriate to be given. As to the LIO instructions, the Government asserts they were affirmatively waived on the record and therefore the military judge had no *sua sponte* obligation to give those instructions. Government Answer of 18 Jan 2005 at 18-20. We find no merit in the appellant's argument.

1. Excessive Force to Deter Instruction

"The military judge shall give the members appropriate

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[2] We have considered the appellant's fifth assignment of error and find the transcript is verbatim. The appellant asserts that an Article 39(a), UCMJ, session is missing on page 301 of the record. We find from reviewing the entire record that there was a RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), conference to discuss instructions rather than an Article 39(a) session. See Record at 301, 314. This assignment of error has no factual basis.

instructions on findings." R.C.M. 920(a). This duty includes "such other explanations, descriptions, or directions *as may be necessary* and which are properly requested by a party or which the military judge determines, sua sponte, should be given." R.C.M. 920(e)(7); *United States v. Poole*, 47 M.J. 17, 18 (C.A.A.F. 1997); *see United States v. Sellers,* 33 M.J. 364 (C.M.A. 1991). Instructions on findings must include a description of any special defenses under R.C.M. 916. *Poole*, 47 M.J. at 17, 18. Any doubt concerning the giving of an instruction should be resolved in favor of the accused. *United States v. McMonagle*, 38 M.J. 53, 58 (C.M.A. 1993)(citing *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981)). The military judge's refusal to give a requested instruction is reviewed for an abuse of discretion. *Poole*, 47 M.J. at 19 (citing *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993)); *United States v. Eby*, 44 M.J. 425 (C.A.A.F. 1996).

The party claiming abuse of discretion bears the burden of presenting conclusive argument on the claim. *United States v. Mosley*, 42 M.J. 300, 303 (C.A.A.F. 1995)(citing *United States v. Mukes*, 18 M.J. 358, 359 (C.M.A. 1984)). Application of the doctrine of abuse of discretion is to be used sparingly and only in those cases where "'a miscarriage of justice would otherwise result.'" *United States v. Fisher*, 21 M.J. 327, 328-29 (C.M.A. 1986)(quoting *United States v. Frady*, 456 U.S. 152, 163 n.14, 71 L. Ed. 2d 816, 102 S. Ct. 1584 (1982)). In testing for abuse of discretion where the military judge refuses to give a requested instruction, our superior court

has held the question turns on "whether (1) the charge [proposed instruction] is correct; (2) 'it is not substantially covered in the main charge'; and (3) 'it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation.'" *Damatta-Olivera,* 37 M.J. at 478 (quoting *United States v. Winborn*, 14 C.M.A. 277, 34 C.M.R. 57, 62 (C.M.A. 1963)).

The appellant's defense team requested the military judge to give the "excessive force to deter" instruction. The military judge denied that request. Record at 301. The Military Judge's Benchbook provides guidance on the use of this instruction and the content of the instruction, stating in pertinent part as follows:

There is evidence in this case that the accused (displayed) (brandished) (_____) the (*state the object used*) solely to defend (himself) (herself) by deterring (*state the name of the alleged victim*) rather than for the purpose of actually injuring (*state the name of the alleged victim*). (Evidence has been offered tending to show (*here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for* both sides).)

A person may, acting in self-defense, in order to (frighten)(or)(discourage) an assailant, threaten more force than (he) (she) is legally allowed to actually use under the circumstances.

An accused who reasonably fears an immediate attack is

allowed to ((display) (threaten the use of)) ((an ordinarily dangerous weapon) (an object likely to produce grievous bodily harm) (_____)) even though the accused does not have a reasonable fear of serious harm, as long as (he) (she) does not actually use the (weapon) (means) (_____) (or attempt to use it) in a manner likely to produce grievous bodily harm.

Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 757-58 (1 Apr. 2001).

This instruction was completely inappropriate in this case. The evidence is clear that the appellant did not threaten the force before using the force in a manner that could result in grievous bodily harm. This instruction (1) would not have been correct; (2) the topic of self-defense was covered by another instruction; and (3) the failure to give the instruction did not deprive defendant of a valid defense. We find that the military judge did not abuse his discretion by not giving the excessive force to deter instruction.

2. Lesser Included Offense Instructions

A military judge has a well-established duty to *sua sponte* instruct on lesser included offenses. *United States v. Jackson*, 12 M.J. 163, 166 (C.M.A. 1981); R.C.M. 920(e)(2). Furthermore, if there are any doubts concerning whether the evidence of record contains some evidence to which the members could attach credit and return a finding on a lesser included offense, those doubts are to be resolved in favor of giving the

instruction. *United States v. Rodwell*, 20 M.J. 264, 267 (C.M.A. 1985). Nevertheless, the defense can affirmatively waive the instruction. *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000)(citing *United States v. Strachan*, 35 M.J. 362, 364 (C.M.A. 1992)). Even where the defense does not want the instruction given, however, the military judge can still give the instruction where the evidence raises the issue. *United States v. Emmons*, 31 M.J. 108, 110-11 (C.M.A. 1990); *United States v. Frye*, 33 M.J. 1075, 1078 (A.C.M.R. 1992).

The appellant's defense team affirmatively waived the military judge's offer to give LIO instructions on attempted maiming, battery, or simple assault even though he affirmatively requested those instructions not be given. The following inquiry occurred:

MJ: Captain Chaney, do you and your client affirmatively waive the court giving those instructions?
IMC: Yes, sir.
MJ: Is it a specific request on your part then that the court not give those instructions?
IMC: Yes, sir.
MJ: Fully understanding that normally those instructions are given?
IMC: Yes, sir.
MJ: Very well. And you've discussed this with your client obviously?
IMC: Yes, sir.
MJ: Very well. And with [detailed defense counsel]?
DC: Yes, sir.

IMC: Yes, sir.

Record at 313-14. The question here is whether the military judge abused his discretion by not giving the LIO instructions the appellant affirmatively waived. We find that he did not. This assignment of error has no merit.

Conclusion

Accordingly, we affirm the findings and sentence, as approved by the convening authority.

Chief Judge DORMAN and Senior Judge RITTER concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix GGG

Article 66(c), UCMJ reads:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.